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In the Supreme Court of the United States

October Term, 1925.

Number [redacted] 170 31

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Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

BRIEF ON BEHALF OF THE APPELLANTS.

James Metzenbaum,
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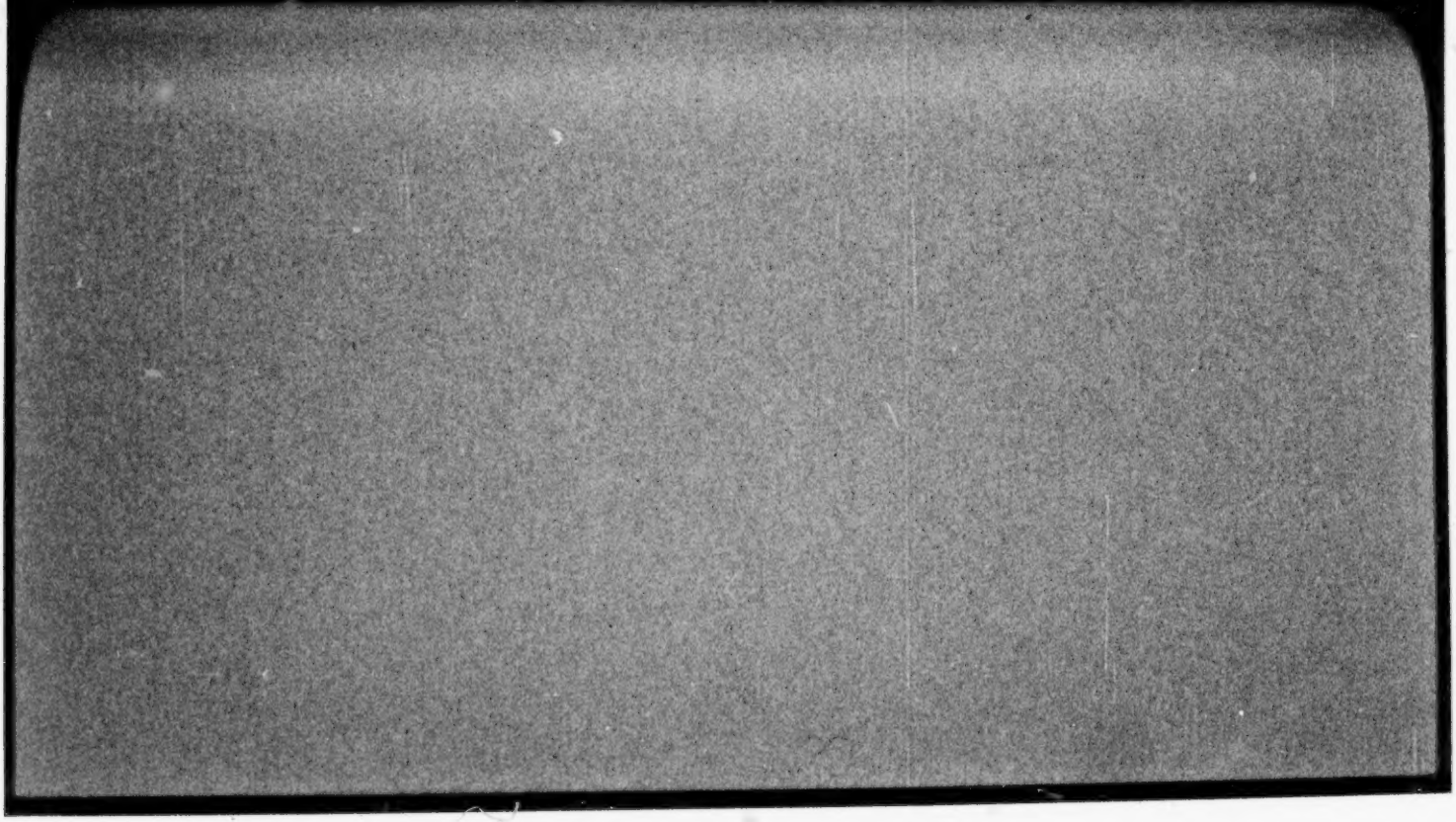
Counsel for the Village of Euclid and The Inspector of Building.



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BRIEF ON BEHALF OF THE APPELLANTS.

STATEMENT OF THE CASE.

This cause comes before this Court upon an appeal by the Defendants from a decree of the District Court for the Northern District of Ohio. The Appellant is an incorporated Village—being incorporated under the laws of Ohio and being located in Cuyahoga County, Ohio. The Appellee is an Ohio corporation, having its principal place of business in the city of Cleveland, Ohio. The opinion of the trial Court is printed at pages 52 to 61 of the Record and is reported in 297 Federal Reporter 307, the decision having been rendered on the 14th day of January, 1924.

BILL OF COMPLAINT.

The Bill of Complaint, found on pages 1 to 28 of the Record, was filed on May 5th, 1923, and asserts, in substance, that the Complainant is the owner of a parcel of property located within the Village of Euclid, Cuyahoga County, Ohio, and being situated between Euclid Avenue —as its southerly limit, and the Nickel Plate Railroad—as its most northerly limit and being further situated shortly west of the thoroughfare known as Dille Road and that the Village of Euclid, by action of its Village Council had on the 13th day of November, 1922, enacted an Ordinance establishing a zone plan, regulating the location of industries, trades, apartment houses, two-family houses, single-family houses and other uses of property, the area and dimensions of lots and yards and the bulk and alignment of buildings near street frontages. (This ordinance appears on pages 13 to 27 of the Record.)

The Bill of Complaint alleges that this Ordinance lessens the value of the Complainant's property, restricts and limits the uses to which it may be devoted and attempts to impose limitations and restrictions which are in contravention of the Constitution of the State of Ohio as well as in violation of the Constitution of the United States and upon these grounds the Complainant sought a permanent injunction at the hands of the United States District Court.

MOTION OF DEFENDANTS.

The Village of Euclid and its Inspector of Building interposed a motion to the effect that because the Complainant had not even applied for a building permit for construction upon any portion or all of the land in question, and because such a permit had never been refused and furthermore because the Ordinance itself provides

for a Zoning Board of Appeals which has power and authority to vary the strict and literal terms of the Ordinance under certain circumstances as recited in the Ordinance itself, that therefore—for each and all of these reasons—the Bill of Complaint presented but a moot and unripened question. This Motion to dismiss the Bill of Complaint was filed on July 20th, 1923, and appears upon page 27 of the Record.

On November 9th, 1923—as appears on page 27 of the Record—this Motion was overruled by the District Court. To this defendants noted their exception.

ANSWER.

Under date of November 14th, 1923, the defendants filed their Answer in the District Court and in this Answer the defendants set forth that the original Zoning Ordinance as adopted on the 13th day of November, 1922, had been materially amended by an amendatory Ordinance which was enacted on the 11th day of June, 1923—prior to and before the filing of the Bill of Complaint.

In this Answer the defendants set forth: That though the Bill of Complaint alleged as the primary grievance, the fact that the property of the Complainant was restricted against industrial, manufacturing and business purposes, to the extent of all but 500 feet distant and south from the Nickel Plate track, the true facts were as set forth in the amending Ordinances of June 11th, 1923, which was pleaded by the defendants (please see lower portion of page 35 and all of page 36 and upper half of page 37 of the Record), as permitting and allowing factory, industrial and all business uses to the extent of approximately 1200 feet distant and south from the Nickel Plate track and that the inhibition against industrial, manufacturing and business purposes extended to but a

distance of 620 feet north of Euclid Avenue, thus leaving approximately *1200* feet—from this 620 foot line over to the Nickel Plate tracks—open and free and permissible for industrial, manufacturing and business uses. (Last paragraph on page 29 and top of 30 of Record and Defendant's Exhibit No. 2—map.)

That the Nickel Plate Railroad, which lies approximately 1800 feet north of Euclid Avenue, was paralleled 1600 feet further north by the Lake Shore Railroad tracks and that the Lake Shore Railroad tracks were themselves paralleled on the north—at a distance of 1600 feet—by St. Clair Avenue and that St. Clair Avenue was paralleled —at a distance of approximately a mile—by the Lake Shore Boulevard and that the Boulevard was paralleled—at a distance of 2000 feet—to the north by the shore of Lake Erie. (Please see Map, which is Defendant's Exhibit 2.)

That the Village has a length—from east to west—of approximately 3½ miles and that all of the land bordering on the south of the Nickel Plate track and thus lying between Euclid Avenue and the Nickel Plate track, was free and open—throughout this 3½ mile length of the Village—and to a width of approximately 1200 feet south of the Nickel Plate track for industrial, manufacturing and business purposes, except where residence streets had been laid out from Euclid Avenue to the Nickel Plate track and where these streets had already been built on with residences. (Page 30 of Record)

That in addition to this great area which, by the Zoning Ordinance, had been left free and open (except for generally recognized nuisance purposes, such as glue factories, tanneries, brick kilns and the like) there was left open for industrialism, by the terms of the Ordinance, *all* of the entire 3½ mile Village length which lay *between*

the Nickel Plate tracks and the Lake Shore tracks—constituting a stretch 3½ miles long and approximately 1600 feet wide. (Upper part of page 30)

That beyond this, the Zoning Ordinance had left virtually all of the northerly side of the Lake Shore Railroad tracks—3½ miles long—free and open for industrial uses. (Page 30 of the Record)

No Industrial or Commercial use has ever built or applied for permission to build in restricted zone.

The Answer further alleged: That not a single industry had ever applied for a permit to build or had ever built any factory, industrial plant, store, commercial or other building within any of the territory forbidden by the Zoning Ordinance (lower half of page 30 and middle of page 29 and lower part of page 34).

Industrial and Commercial use would injure Health, Safety and Welfare of Community.

The defendant alleged that the use of this restricted strip of complainant's land, which lay adjacent and close to Euclid Avenue, if permitted for industrial, manufacturing or commercial purposes, would be injurious to and would be subversive of the health, the safety and the general welfare of the community.

It was set forth in the Answer and much of the testimony tended to prove that by virtue of the Zoning Ordinance, the value of the property of the complainant had been *increased* and that its use in accordance with the Zoning Ordinance would really mean greater profits and earlier income than if held for industrial or manufacturing or commercial purposes and that instead of the Ordinance having lessened or reduced the value of the complainant's land it had and would, in reality, increase and

enlarge the value and the profits to be received from this land.

It was further alleged by the defendants that the complainant had never made any application for any building permit and had never been refused any permit and that it had never applied to the Zoning Board of Appeals for any relief from any refusal on the part of the Inspector of Building to issue a permit, nor had the complainant applied to the Village Council for any amendment of or relaxing of the Zoning Ordinance even though the Ordinance itself provided a full and sufficient course of procedure in each of these respects.

The Answer pleaded the fact that Section 3 of Article XVIII of the Constitution of Ohio (being the so-called comparatively recent Home Rule Amendment adopted in 1912) had authorized municipalities in Ohio, to adopt and enforce, within their respective corporate limits, such local police regulations as are not in conflict with the general laws and that the Legislature of Ohio on February 20th, 1920, had established a Zoning Enabling Act set forth under Sections 4366—1 to 4366—12 of the General Code of Ohio and that the Zoning Ordinance in question had been enacted by virtue of said Section 3 of the Ohio Constitution and by virtue of the express authority of Sections 4366—1 to 12 of the laws of Ohio. (Enacted in 1920 and found at pages 1125 to 1127, Throckmorton's Code of Ohio Laws.)

Study and Investigation of conditions and dangers before Ordinance was enacted.

In conclusion, it was pleaded and proof was offered—that before any of the provisions of the Zoning Ordinance had been adopted, a most thorough investigation and research and study had been made by a Commission ap-

pointed under and by virtue of the aforesaid State Enabling Act and the results and reports of many other investigations from other cities and states had been carefully considered and every phase of the entire subject and of each section and portion of the Village had been thoroughly considered and surveyed and taken into account and after this most exhaustive research the Zoning Ordinance had been adopted by the unanimous vote of the Council of the Village of Euclid, in the exercise of its Police Power and for no other purposes and solely in order to provide and promote the safety, the health and the general welfare of the people of the community.

As hereinafter pointed out, each of these allegations in the Answer of the Defendants was supported by proof and evidence and most of the allegations were uncontradicted and admitted by the complainant, except as to the lessening of the value of the land of the complainant, except as to the Ordinance being within the Police Power and as to the question of the constitutionality of the Ordinance.

HOW TESTIMONY WAS TAKEN.

All of the testimony was taken by depositions and no witnesses appeared before the District Judge. The Court (page 52 of the Record) stated that:

> "After issue joined, the evidence was taken and submitted in deposition form.
>
> "This case is obviously destined to go higher. On appeal in equity cases, a reviewing court weighs the evidence, and when taken in deposition form it can do so as well as the trial court."

The Trial Court having held the Ordinance wholly null and void and having decreed a permanent injunction against the enforcement of any and all parts of the Ordinance, as prayed for by the Complainant, this cause is

brought, on appeal, to the Supreme Court of the United States by virtue of Section 238 of the Federal Code of Procedure and here the Village of Euclid and its co-defendant ask that the Supreme Court of the United States may reverse the decree of the Trial Court and may hold the Bill of Complaint to be unentitled to the relief prayed for therein.

FACTS AS ADDUCED BY THE TESTIMONY. ARGUMENT IN CONNECTION WITH THE FACTS.

The Situation in the Village of Euclid:

The Village of Euclid lies to the east of Cleveland and East Cleveland, with Lake Erie on its north, the highlands south of Euclid on the south, and the Cuyahoga County line on the east.

Three main highways traverse it from east to west: Lake Shore Boulevard along the lake shore; St. Clair Avenue about the center of the village; and Euclid Avenue on the south. The Nickel Plate Railroad passes through the village about eighteen hundred feet north of Euclid Avenue and the New York Central Railroad some distance north of the Nickel Plate. The property adjoining these railroads is admirably adapted for industrial development and is *freely permitted* for such uses by the Zoning Ordinance. (See Map—Defendant's Exhibit 2. All thereon in red is open to Industrial uses.)

During the war and for a year thereafter there was great activity in Greater Cleveland, in factory development, and stimulated with the belief that the demand would continue, there was created a great boom in all vacant land adjacent to railroads. Great tracts were bought up by speculators and prices increased many times above the value of vacant farm land, to extravagant prices

demanded for so-called factory sites, considering the great area of such land throughout the metropolitan area of Greater Cleveland. The Village of Euclid came in for its share of this industrial boom, and prices for the land along both railroads went soaring.

But even during all of this boom not a single commercial or factory or industrial structure or store was built in the entire 3½ mile strip adjoining Euclid Avenue, even though there was no such ordinance then in effect.

Then came the collapse of 1920 and the fires in many of the mills and factories in the country went out. An inventory thereafter found most of the factories had expanded beyond the demand for their products. There was no expansion in 1921, little in 1922, and even now we find all the witnesses who have testified here, say that at the present time there is *no* demand for factory sites especially in such an outlying territory as Euclid Village.

Witnesses of recognized standing testified that it will take some years to make full use of even the present factories in the village. (Bottom of page 129, page 180, and middle of page 191 of the Record)

For years the village has developed as a residence district instead of manufacturing (Ambler, middle of 143). People were there seeking freedom from smoke and noise. The President of the complainant company recognized this, laid out a restricted residential allotment *east* of and immediately next to the sixty-eight acre tract involved herein (top of 147, and lower half of 101). This allotment runs up to the Nickel Plate track. All these lots are sold and built upon except the corner lots on Euclid Avenue. Another strictly residential allotment adjoining the sixty-eight acres on the *west* and immediately next to the complainant's 68 acres has been built up. The complainant has held the land described in the Bill of Com-

plaint, for eleven years without development of any kind. There has been, during all that time, a demand for it for home sites and there is a great demand now for that purpose. There is no demand for it for factory sites or business. (Page 199, bottom of 196, upper part of 195; upper part of 160 and top of 161 of Record)

Mr. Greenlund,—former Lieutenant Governor of Ohio and life long resident of Cuyahoga County—of acknowledged experience as a realtor of Cleveland, testified that the best way to develop that property at present time was for home sites. (Pages 180-181 and top of 183; last paragraph of 128.) One could by this means sell it readily and make more money and much more quickly than by holding for future factory development as that was a burdensome process, for taxes and interest charges would consume values.

The claim that the Euclid Avenue frontage should be unrestricted seems untenable from *health, safety* and *comfort* standpoints. Allotments exist all along the hillside south of Euclid Avenue (lower half of page 100 and upper half of 101), and the closer factory development comes the greater discomfort to the home dwellers living there. The claim of the plaintiff that lots in this territory will be devoted to homes "for skilled workmen in the factories as they are established along the railroads" is no answer to this desire on the part of the citizens of the village. These homes—though they may be pictured by the complainant's witnesses as but modest or "workingmen's" homes—should be protected just as far as the circumstances require. (See page 94 at middle; last lines of 158 and top of page 159 and top of page 149.) The Ordinance fixes a line 620 feet north of Euclid Avenue as the limit of approach of factory uses. In view of the fact that no industrial development has been made of a vast part

of the 1400 acres available, and that not even one factory or commercial building or store is now or ever has been located within the restricted line, it does not seem to be unreasonable if restricted, as provided in the ordinance. (Please see lower portion of page 94; last paragraph of page 103 and Mr. Ambler's own admission in the second last paragraph of page 141; middle and lower half of page 34; the mayor's testimony at the middle of page 171 and the proof that the line was established as requested by the industrial interests themselves, as evidenced by the testimony at the lower portion of page 206.)

Indeed, the complainant's own witnesses freely granted that the reasonable and proper development of this 620 foot strip is for residence purposes (kindly note Kunkle, their witness, at last paragraph of page 92 of the Record and the last paragraph of page 140 as testified to by Mr. Ambler himself).

It is important to bear these facts in mind for it was impossible for any of the witnesses to say what the fair market value of any of this industrial land was, for the reason that there is no market and no demand for it at present, and there will not be for some years to come. (All of page 180; last paragraph of 128; top of 161—their witness—and middle of pages 191 and 199.) All the evidence is based upon the asking or intended or estimated prices rather than the market value.

But as all witnesses gave their testimony upon the same theory, a reasonable basis of comparison is afforded. It was the belief of defendant's witnesses that to purchase factory property in the village now at the value given, the carrying charges while awaiting a market would "break the purchaser's back." (Upper part of page 195)

There is, however, a great demand for home sites in the village. Large allotments are laid out on the lake

front, between the boulevard and St. Clair Avenue, and on the hillside which forms the south side of Euclid Avenue. (Middle of page 181 and upper part of 105)

Recognizing the trend of industrialism, which—when unsuperintended—brings the many ills of congestion, noise, smoke, odors, accidents, crowded thoroughfares and their attendant dangers, slums, "blighted" districts, vice and contagious and communicable diseases, the village council began the discussion of a zoning ordinance with a view of establishing a safe and healthful and welfare-serving future development of the village.

One object was to locate the factories reasonably removed from residence districts. This was quite simple, as the factories naturally would follow and had followed close to the railroads.

Vast Area of 1400 Acres served by Railroads is open to Industrial uses.

The Village contains 7400 acres and the property set apart as unrestricted for factory development is from 1400 to 1500 acres lying between Euclid Avenue and St. Clair Avenue, and shaded in red on the zoning map which was introduced into the Record by the Village. (Please see Defendant's Exhibit 2)

Through this vast tract, three and one-half miles in length and almost a mile in width, run two railroads—the Nickel Plate and the New York Central (sometimes termed the Lake Shore Railroad)—thus admirably serving this unrestricted industrial territory with railroad facilities.

The original zoning ordinance—enacted November 13th, 1922, limited this industrial area south of the Nickel Plate track to a line drawn about 500 feet distant and south from the Nickel Plate track. The amended ordinance—

enacted July 11th, 1923, prior to the hearing of this cause —increased this industrial area to a line on an average width of 1200 feet distant and south from the Nickel Plate track or to a line 750 feet north of Euclid Avenue. This 750 feet is zoned by the ordinance as follows: the 150 feet abutting upon the avenue is restricted to one-family houses—to "Use One"; the next strip north of 470 feet is restricted to "Use Two" or two-family residences; the next 130 feet—which approaches and abuts upon the unrestricted industrial territory—is permitted for use by factory administration and by factory offices and similar buildings. This makes a restricted strip abutting upon Euclid Avenue of 620 feet in width.

Safety is one of the prime provisions of this ordinance.

If was felt that in planning this kind of a program, many accidents would be avoided in the future, much congestion would be eliminated and the safety of the people would be very greatly enlarged. (Please note upper portion of 183, all of page 184, lower portion of pages 110, all of 111, 112 and 113; last paragraph of 200; lower half of page 121.)

Some of the witnesses say the value of the land lying between the Nickel Plate Railroad and the 620 foot line is equally valuable per acre for industrial purposes; others say it is more valuable next to the railroad and decreases in value toward the south—that is—toward Euclid Avenue. Some say it is less valuable by reason of the restrictions; others that it is more so because of this very ordinance. (See last paragraph of page 180 and upper half of 181 and upper portions of pages 182 and 185 and top lines of 191 and lower half of page 119; upper part of 121; upper part of 34, middle of 35, bottom of 128.)

HEALTH is a large factor in this ordinance.

The hillside referred to in the testimony and in the Answer (page 125 and lower part of 104; bottom of page 28 and top of page 25), which begins on the south side of Euclid Avenue and which extends along the entire length of Euclid Avenue (3½ miles) throughout the Village—constitutes a most desirable location for home sites by reason of its elevation. The streets on this continuous hillside, as shown by the zoning map, are to a great extent laid out in curves in the manner of boulevards, and the expense of laying out these allotments would seem to preclude the idea that they would or could be sold or used for factory or commercial purposes. It was naturally the desire of the framers of the zoning ordinance to protect these present and prospective developments for home sites, and certainly the nearer the manufacturing development comes to them, the greater would be the discomfort and annoyance to the inhabitants dwelling there and the greater would be the probable and possible impairment of the health and of the healthful conditions of those who now do and who in the future will reside there. (*Please* see lower portion of page 120, all of 121, lower half of 110 and all of 111; page 208; upper half of page 184 and middle of 185.) And there is a necessity, if factory development follows, to provide available territory for the homes of common labor as distinguished from skilled labor, and it was anticipated that these homes could be constructed on the reserve strip north of Euclid Avenue in a portion of the 620 foot strip.

The testimony given by plaintiff's witness Kunkle, is that the property of the plaintiff was more valuable for manufacturing purposes than any other, but that to make the greatest and most profitable use of the property would require the dividing of the complainant's sixty-eight acres

into small manufacturing tracts *with switch connections which would come to the very north line of Euclid Avenue.* (Kindly note lower half of page 93, top lines of page 94; 3rd and 4th (concluding) paragraphs of 161; concluding 5 lines of the second last paragraph of page 89) and when considering this witness' testimony it must be borne in mind that he contemplates that kind of a development—switch tracks operating up to the north line of Euclid Avenue itself. It would appear that reasonable persons would admit it would be most undesirable development from every standpoint of safety and health and general welfare of the community.

At the same time, Mr. Kunkle places a valuation on the frontage of Euclid Avenue in excess of the valuation placed upon the remainder of the property for manufacturing purposes, even at the very high prices that he gives as to the value per acre of the entire tract. If it may be admitted that the Euclid Avenue frontage may some day be more valuable for store purposes than for residences, yet if there be any reasonable relation between the limitation on one hand and the general welfare on the other, that limitation is constitutional.

The ordinance is purposefully drafted so that, in the future and from time to time, as conditions and territories alter, the zone districts may keep step therewith and may be accordingly altered and revised just as Fire Limit ordinances and zones are—from time to time—extended and revised as new and altered conditions demand. But when such revisions are made they will be the result of (a) an apparent *general* situation and need for such modifications and revisions and not due to the dictation or actions of some one single property owner in disregard of the public safety and welfare, and (b) they will be revisions which will be made on the basis and for the purpose of

the Health, Safety and General Welfare of the entire community just as revisions in Fire Zone Districts are not left to the whim or actions of some one property owner but are, on the contrary, the result of action based on the safety and welfare of the entire community. (See Section 25, 25A, B, C and D of the Ordinance on page 25 of the Record; bottom lines of page 186 and top 3 lines of 187 and page 38 of the Record.)

The officials of the village who patiently sat through all the months of considering of the ordinance, who knew every foot of the land, who knew all the conditions of actual development, and were in a position to look forward to the future development of the village, were in a position to determine whether or not the general welfare would be better served by restricting it to residence purposes than for any other purpose. (Pages 167, 168, 169, lower part of 170 and upper portion of 171; lower half of 205 and all of 206.) And if there be any relation of public welfare (as the testimony showed and as we later herein feel has been shown) with this limitation, the courts will not substitute their judgment and will not strike down this regulation or the ordinance as a whole.

WHAT PROOF AS TO DAMAGE OR CONFISCATION?

The testimony of Greenlund and Laronge—the latter being admittedly the most extensive Real Estate operator in Greater Cleveland—is to the effect that plaintiff would receive *more* money for the Euclid Avenue property for residential purposes and receive it more quickly than if the company would hold it for uncertain factory development, as it may be many years before the property is available for such development and there is such a great unrestricted area, that any immediate development of the property for industrial purposes would first be next to

the track, as the track is the magnet that draws the industry and the closer the factory is to the track the more available are its means of transportation. (All of 181, top of 195, all of 180; middle paragraph of page 197 and middle of 199.)

The Complainant's principal witness (Kunkle) toward the lower portion of page 92 of the printed Record gave convincing evidence against there being damage or confiscation, for he said:

> *"The natural and logical way for the development of that property immediately north of Euclid Avenue (which is the 620 foot strip in question) is by allotment for working men's homes."* (Italics and parenthesis supplied)

This witness virtually repeated this opinion in the bottom-most lines of this same page 92 and again in the middle paragraph of page 93.

> "The natural and logical way for development thereof implies the best and most productive way, and therefore if one rests upon the declarations of their principal witness, all proof of confiscation is banished and nullified."

Loss resulting from being limited against injuring the public is not the kind of damage proving unconstitutionality.

If one looks at this same principal witness' testimony in the concluding six lines of page 85 one finds him giving a value at the rate of $44,000.00 an acre for a Euclid Avenue 40 ft. lot with a switch up to it.

Disregarding the fact that (a) this same witness had, when previously before the Notary, at lower part of page 73, given an average value of about $14,000.00 an acre even when so served with switches (upper part of 73),

and (b) that all other plaintiff and defense witnesses said there was no market for industrial land in Euclid (page 160, 161 their witness; middle of 191, 180, 181, 128), and (c) that all defense witnesses placed unrestricted valuations ever so much lower; from $3500.00 to $8000.00 an acre (pages 180, 128, bottom of 131, 196) and (d) that the majority of witnesses said the ordinance would *increase* the value of plaintiff's land (pages 180-181-182, 128, 197, 199), (e) It is nevertheless true that this valuation and the comparative loss pretended to be shown by this zealous and principal witness was based upon the subdividing of these 68 acres into 1 to 5 acre parcels and upon the right to serve these average 3 acre parcels *with switches right up to or parallel with Euclid Avenue,* plainly in disregard of the public safety and welfare. At page 89 this witness said:

> "A plant buying three acres would insist on a railroad. You couldn't sell three acres out there without railroad facilities. The value for industrial purposes on Euclid Avenue would not then be any greater than for any other uses. The railroad is what makes the industrial value, of course."

And this he followed with further testimony concluding at the bottom of page 93 and top lines of 94 as follows:

> "I suppose, if that kind of development takes place, railroad tracks may be built *right alongside of Euclid Avenue,* within clearance distance of the Avenue, the north line of it, unless there is a law to stop it."

So, too, their other witness, in reference to such tracks and danger resulting (161 and lower half of 149 are important).

We repeat that damage resulting from a prohibition to so injure the public does not give grounds for the Trial Court declaring that "substantial damage was proved";

at all events not such damage as is required in order to show unconstitutionality.

Then too, this extravagant valuation was based upon the value of a *40 foot lot on Euclid Avenue* being industrialized and being served with a switch up to Euclid Avenue. Then this eager witness took the square feet in such a *40* foot *Euclid* Avenue lot and multiplied it by the number of feet in an acre and thus he arrived at this valuation, which we submit is a specious form of reasoning, for the reason that an *acre* would not have all frontage on Euclid Avenue as a 40 foot lot would have and for the further reason that a 40 foot lot could not be industrialized nor could it, commercially or practically, have a switch on it. Beyond all this, a lot or land fronting on Euclid Avenue and being industrialized and served with a switch upon it up to Euclid Avenue would be a menace to the public welfare and surroundings and to the safety and health of the community.

It should be remembered that Mr. Ambler's testimony was founded on this same basis of being "cut into smaller parcels with switches set in, giving all the smaller parcels track connections." (Page 137) And so, too, was Mr. Witzel's testimony. (page 161)

In the same way it is found that Mr. Ambler's opening testimony at page 135 is based upon this same right to run tracks and to industrialize right up to Euclid Avenue, for he predicated that and all his testimony upon the frank admission of its being "*unrestricted in every way.*" The lessening of value which comes from protecting the public against the liberty to use the land right up to Euclid Avenue "unrestricted in every way" is not such damage as will render this ordinance unconstitutional.

All witnesses conceded (lower half of page 94) that because of the decided elevation of all of the land on the

opposite (south) side of Euclid Avenue (note bottom of page 104), that side can never be used for mercantile or industrial purposes and would necessarily be used for residences alone and indeed much of it is already allotted and privately restricted for that very purpose (pages 100 to 103).

The Court will see that whether having in mind this three and one-half miles of residential hillside on the south side of Euclid Avenue or whether keeping in mind the safety and welfare and protection of all pedestrians, of all travellers and of all people on Euclid Avenue itself or whether having in mind the solid residence streets which were laid out by President Ambler himself and which hem in this present tract on the east, or whether having in mind the solidly built up residence streets which surround the Ambler Company present land on the west, or whether having in mind all of these conditions together —the situation inevitably leads to so plain a result that none could possibly blind themselves to the health, the safety, the welfare, convenience and public good which would be impaired and affected by having *tracks* and *trains* running up to Euclid Avenue or immediately parallel therewith and *factories* on Euclid Avenue.

We submit that when Witness Kunkle took the position and contradicted the above referred to quotation taken from his testimony (page 92 of the Record) he found himself in the dilemma of appealing to the Courts of the United States for relief to be granted to this complainant so that complainant might increase the value of its land by disregarding the health of the community, by invading the safety of its people, by destroying the peace of all of the surrounding homes—to the east, to the west and across the street—by bringing its noise and its menace and its smoke and its rumbles almost up to the doors

of all the surrounding property and up to the side walk of the main thoroughfare of the municipality. And this was the appeal of Mr. Ambler as well.

In this connection, witnesses testified that the danger to inhabitants would be greatly increased if industrial development or tracks were allowed to come up to the north line of Euclid Avenue and examples were given where, shortly outside of Euclid Village, just such conditions now prevail in East Cleveland (having come there before East Cleveland zoned) and only a little further down in Cleveland as well. (See striking examples at concluding paragraph of page 105 and upper part of 196; last paragraph of 110; first paragraph of 111; lower portion of 120; lower portion of 185; bottom of 182 and top of 183; concluding paragraph of 200 of the Record.)

The 620 foot strip was regarded by plaintiff as well as by defense witnesses to be ideal, to act as a buffer and to go far toward protecting the public safety and welfare. (Kindly note their witness at lower part of page 92; 115, 119, 121, 182, bottom and top of 183, lower part of page 185 and 199, 200, 201 of the Record.)

This Supposition did not prove damage.

It is true that when Witness Kunkle appeared before the Notary for the second time he did testify that the Ambler parcel would be worth only one third of another value, but it is to be remembered that he so testified upon an assumed set of facts admittedly *not* provided by the ordinance, for, at lower portion of page 85 he said

> "Taking the Ambler tract of sixty-eight acres as described in the petition, if that acreage as a *whole* were restricted to residence purposes, I would say that its market value would be less than one-third of what it would be for industrial use."

Perhaps this statement influenced the Trial Court to write that "Substantial damage was proved." But if so, it was unfortunate, for the witness predicated this damage upon the basis of the *entire* and "whole" of these 68 acres being restricted to residence; that is, upon a supposition that industry was barred all the way *up to* the railroad track from Euclid Avenue, and upon the idea that residence use was the only use allowed even up to the tracks, whereas industrial use *is* allowed for all but the 620 foot strip bordering Euclid Avenue, which strip was segregated for the protection of the community safety and welfare.

It is true that *if* the ordinance permitted houses alone to be built from Euclid Avenue up to the tracks and if the ordinance forbade Industrials to use the land from the 620 foot line up to the railroad, (all of which was *assumed* as the basis of this testimony), then there would have been a great diminishing of value, for the land toward and near the railroad is not adapted to residence use whereas it is ideal for industrial development, so that such a limitation which was assumed—of a proscription against industry up to the tracks—would have been a limitation unreasonable and unrelated to public welfare needs and therefor that damage would not have been justified by the Police Power.

But as it is apparent that this was but a supposititious set of facts not at all consonant with the situation under the ordinance, we submit it can not form the basis of any finding that "damage had been proved."

The opening paragraph of Mr. Ambler's testimony on page 135, at first blush appears to show a very marked depreciation, but a careful and second reading of this paragraph will show that this testimony of Mr. Ambler was predicated upon the same theory as was that of Mr.

Kunkle to which reference has just been made; for Mr. Ambler was testifying upon the supposition that all of the land right *up to* the railroad tracks was limited against industry and in favor of residence, whereas industry has free play throughout 75% of that land and is proscribed only along the 620 foot strip which is provided as a protection to the public welfare and safety. It is apparent that Mr. Ambler was testifying upon this supposititious condition, for he is contrasting the entire sixty-eight acres unrestricted as against the *entire* sixty-eight acres restricted for residence alone.

In this connection it is interesting to note that Mr. Ambler has here testified that for residence purposes it would be worth but $2000.00 per acre whereas, at the upper portion of page 144 he testified that the residence street laid out by his father—the president of the Complainant company—which lies immediately next to and is located the same as the sixty-eight acres in question, was sold on the basis of $1200.00 per lot, which at the testified-to rate of seven lots per acre, would of itself be $8400.00, rather than the $2000.00 which he pictured in his opening statement on page 135 and that $1200.00 per lot valuation was for some years ago and is concededly substantially greater at this time. Even disregarding this variance in testimony between the two statements of this witness, we submit that if the Trial Court was influenced by the opening testimony of this witness on page 135, it was unfortunate for that testimony was founded upon a *supposition contrary to the facts.*

Value not diminished by 620 foot strip.

Witness Stein testified that all of the occupied Euclid Avenue frontage was taken up with residences alone except at the "Center," and at the bottom of page 102 and

top of page 103 he particularly detailed that there were residences only, along Euclid Avenue east of Chardon Road and up to and beyond Bell Avenue, now East 219th Street. Mr. Ambler, at the bottom of page 136, testified that another twelve acre parcel owned by his father is located between the Nickel Plate track and the rear or north line of these residences which are located along Euclid Avenue and which face along 219th and 221st Streets running quite some hundred feet north toward the Nickel Plate track. This locates the twelve acre parcel between a line several hundred feet north of Euclid Avenue and the Nickel Plate track, so that there is here presented the exact situation which would arise under the ordinance—having a buffer of residences between the north side of Euclid Avenue and the industrial area.

Witness Stein testified that all of this strip so lying between Euclid Avenue and the twelve acre parcel of Mr. Ambler was completely occupied by residences.

It is worthy of note that although Mr. Ambler testified (at the middle of page 138), that this twelve acre parcel would be of less value than twelve acres located where the sixty-eight acre parcel is situated, because the twelve acre parcel lies quite some distance east and out than the sixty-eight acre parcel, and although he gave $10,000.00 per acre as the value of the entire sixty-eight acre parcel if not cut up into small units, he voluntarily (at page 136) conceded $8,000.00 an acre for the twelve acre parcel, though that twelve acre parcel was not cut up into small units and though it lies less advantageously and even though it does *not run to Euclid Avenue* because the strip along and near to Euclid is completely taken up with residences. Considering the fact that this twelve acre parcel is admittedly less valuable because it lies further out in the Village, Mr. Ambler gives to it almost the same value per acre as he

gives to the sixty-eight acre parcel, notwithstanding the fact that the twelve acre parcel does *not go to Euclid Avenue* and that the valuation thereon was fixed by a sale of *several years ago.* This testimony of Mr. Ambler would seem to indicate that in addition to the 620 foot strip being necessary in order to protect the public welfare and safety —as contended by the Village—it does *not* depreciate the industrial land to the north thereof, which quite fully corresponds with the testimony of the majority of the witnesses.

No damage from limitation against Store Use.

So completely was it recognized that there was no present or early requirement or demand for stores or commercial purposes, that there is hardly more than a mention of such uses or purposes. Not a witness referred to any stores except the cluster at the center of the village. Even though substantial areas are allowed for store and commercial purposes, it is admitted that along the Euclid frontage there is not a store other than in the "center" (pages 100-102-103), even though the ordinance *does,* at frequent points, permit stores along Euclid Avenue at locations where, after most careful study and investigation, it was determined that their presence would not be prejudicial to the public welfare.

No witness for complainant tried to show any demand for such sites and the defense witnesses repeatedly testified there was no demand or sale for such purposes (middle of 199, middle of 194, top of 187). There was not and, under the circumstances, there could not have been any proof of damage or confiscation on that score.

In Complainant's brief perhaps it will be told why—though the Trial Court's injunction has freed their land, for almost two years, from the effect of the ordinance and

though this Appeal under the Federal Practice did not suspend the injunction—no store or commercial or factory building has been built on plaintiff's land along or near to Euclid, and why no such structure has ever been built anywhere on or near to Euclid Avenue since or before the injunction, even on the frequent areas along Euclid Avenue allowed for store and similar commercial uses.

In this connection the Court will see how little Mr. Ambler thought of store use when he put this valuation at only $100.00 a foot with a 200 foot depth (middle of page 136) and when he spoke of the lack of demand for store purposes (middle of page 137). Mr. Ambler's store valuation was no greater than that for residences as placed by other witnesses, because he recognized that there was no demand for use for such purposes. These admissions certainly did not prove damage nor render the ordinance unconstitutional.

What he and his chief witness, Kunkle, were contending for was not for store or similar commercial uses, but for the right to *industrialize* right up to Euclid Avenue and to bring switches and tracks up to and parallel with Euclid Avenue—regardless of the injury to public health, safety and welfare.

We urge that there can not be pointed out any clear or convincing proof of damage in respect to store use either. But even if there had been such proof, that of itself would not have rendered the ordinance unconstitutional if such damage is the result of a reasonable exercise founded upon protecting of the homes which constitute the only class of structures along the entire Euclid Avenue and along all streets leading therefrom, (except at the "center").

The only other witness who testified on behalf of the complainant in reference to values, was Mr. Chase

Witzel. Who can read his testimony on page 155 and the upper portion of 156 and arrive at any certainty or be pursuaded that there is any confiscation or damage?

A reading of this testimony would appear to indicate that this complainant's witness may well be said to have placed a higher and *greater* value upon the complainant's land with the ordinance in effect than without the ordinance applying. (Kindly read lower portion of page 162 and all of 163.)

This witness for complainant appears to have demonstrated at bottom lines of 154 and at upper half of page 155, that if the regulated 620 foot strip between the industrial area and Euclid Avenue were allotted and used for residence purposes as provided by the ordinance, it would bring $25,000.00 an acre. This is more than any witness—plaintiff's or defendant's—valued this land if used for industrial or commercial or store use. (Except Kunkle's valuation of $44000.00 for a 40 foot Euclid Avenue lot if a switch went up to Euclid Avenue.) This witness—Mr. Witzel—valued the Ambler parcel, unrestricted, at $8500.00 to $10000.00 per acre (page 149) and here, for residence purposes he valued it at $25000.00.

This did not justify the finding; "That substantial damage had been shown." Can anyone say that this witness's testimony distinctly or clearly proved confiscation?

These three witnesses—Kunkle, Ambler and Witzel—were the only ones who testified for the complainant in reference to values as affected by the ordinance. Is it possible to come to a conclusion to the effect that any or all of these three witnesses proved damage unrelated to the public safety and welfare? And in this connection it is to be remembered that the duty of clearly proving and establishing confiscation, is a burden which rests upon the complainant.

We are to be reminded that the Trial Court did not see or hear any witnesses as it had no more than the record before it.

Beyond all this, may we take the liberty of saying as stated in other parts of this brief—that even if a lessening of the value were to have been proved, that would not necessarily invalidate the ordinance (*Chicago and Alton Railroad vs. Traubarger*, 238 U. S. 67; 239 U. S. at page 410—*in re Hadachek*).

The Defendant's PROOF of INCREASED Values and benefits from the Ordinances.

In addition to the concessions and the admissions of complainant's own witnesses and in addition to the apparent lack of proof of confiscation, there is the testimony of the defendant's witnesses to the effect that the value of the complainant's land is increased and enlarged by virtue of the ordinance itself.

Former Lieutenant Governor William Greenlund—recognized as one of Cleveland's outstanding realtors—gave a clear computation and very convincing testimony in the concluding paragraph of page 180 and the first paragraph of page 181 wherein he testified as follows:

> "If, under the Zoning Ordinance of the Village of Euclid, there are 750 feet reserved from that same tract of land, fronting upon Euclid Avenue, for residential purposes, the value of the balance from the zoning line north to the Nickel Plate track, the industrial property, I think, would be increased in value, because you are restricting, first the number of acres that can be used for that particular purpose. The increase in value might not come at this time, but it would come at some time in the future. I would say that the fair market value of the Euclid Avenue frontage throughout this section, say back 150 feet, would run something

between $75.000 and $100.00 a foot, for residence purposes. In my judgment, the value of the remaining property within the zone limits, north of the 150 foot line from Euclid Avenue to the 750 foot strip, exclusive of improvements, because those would be paid for anyway by the man who buys the land or buys the lots, would run from twenty to twenty-five dollars a foot up to something in the neighborhood of thirty to thirty-five dollars a foot, the closer you are to Euclid Avenue.

Reducing that to value per acre, first on the Euclid Avenue frontage, using 40-foot lots as a basis, and seven lots to the acre, 40 by 150—it is not necessary to make them that deep, but it would run fairly close to seven lots to the acre—it would run at the rate of *$21,000.00* an acre. The rear of the property, and I am taking only an average there of $30.00, which I think is low, and the lots would be about the same number per acre, would run about $8,500.00 per acre, and by the rear of the property I mean the property in the rear of the Euclid frontage, back to that 750-foot line, whatever that may be, that arbitrary line,—it would be in the neighborhood of $8,500.00 per acre. In my judgment, if that property were zoned by establishing first a line back across east and west through the property 620 feet, and devoting that to residence purposes, restricting it to that purpose, and then 150 feet restricting that to residence purposes and office buildings of any manufacturing establishment that might be located on the ground north of it, *I don't think there is any question about that increasing the value of the industrial property north of the 750-foot line to the Nickel Plate track.* (In my judgment that property would not be damaged to the extent of $150,000.00 if those zone lines were adopted and maintained and established.)"

We have placed these last few lines in parenthesis because on page 165 of the complete testimony before it was put in narrative form, the following occurred:

"Q. In your judgment, would that property be damaged to the extent of $150,000.00 if those zoning lines were adopted and maintained and established?

A. Not in my judgment, no."

From the earlier lines of the quotation from the narrative form, it is evident that Mr. Greenlund was *not* admitting that there might be some loss but that it might be less than $150,000.00; and yet, in order that there may be no possible misinterpretation of the concluding lines of this narrative form, we have made this explanation, for the narrative form is quite possible of misinterpretation at this point.

In the above quoted testimony Mr. Greenlund indicates not only by statements but by actual figures that if the Zoning Ordinance is followed it will make the complainant's land worth not merely what is the highest estimate offered by the complainant's witnesses but will very substantially increase and enlarge even that maximum value. (Also see upper portion of 182.)

This witness fortified his position by reference to the requirement for the supply of labor, the protecting of the community against the damage arising from the so-called "mixed" development which would result if the ordinance were not effective and by further evidence to the effect that the sale of the land would be not merely at a much greater figure but in a much shorter time than if the complainant were to be allowed freedom from the ordinance. (Kindly note middle of page 186, bottom of 182 and top of 183, bottom of 183 and top of 184, upper portion of 194.)

In the same way the defendant's proof given through Mr. Stein (Bottom paragraph of 131, third paragraph of 132, and particularly in his testimony which reaches down to the bottom of page 128) clearly indicates that the complainant would be *benefited* by virtue of the ordinance rather than be a loser thereby.

Beside the convincing evidence of Greenlund and Stein, there is the testimony of Laronge. If one will but read just below middle of page 197, last paragraph of 198 and just above and below middle of 199 of this witness's testimony, one is compelled to the conclusion that here is to be found distinct evidence against any claim to the effect that the complainant's property is damaged or is being confiscated by virtue of the ordinance.

Notwithstanding this array of testimony of plaintiff's and defendant's witnesses, the Trial Court wrote at the lower portion of page 308 of 297 Federal Reporter:

> "None of the important or controlling facts are in dispute, with the single exception of the extent of that damage; but even here there is no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial."

We believe that there was no genuine proof of any damage and that there was much proof of enhancement of value accruing to Complainant's land by virtue of this ordinance. We submit it is hardly correct to say: "There was no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial." The *only* damage which was put in evidence was founded upon a plan highly and plainly injurious to the public safety and welfare—Tracks and switches up to Euclid Avenue and factories thereon.

LABOR SUPPLY.

An important feature which occupied the attention of the inquiry before the Notary Public, was that phase which concerned itself with the general welfare being improved and best served if the community were to have space and room for the proper and uncongested and nearby housing of the Labor Supply which will ultimately be needed in order to man and operate the factories and

industries which may find it possible to locate in the vast tract of more than 1400 acres which has been designated for industrial purposes within the Village of Euclid.

Not merely the witness for the defense, but the complainant and its witnesses united in assertions to the effect that it requires approximately five times as many acres in which to properly and sanitarily house the people as is required for the factories and Industrials which will require the services of these people.

The figures presented by the Village Engineer, Mr. Fred Pease, and the testimony offered by Mr. Ambler, by Mr. Kunkle and by Mr. Witzel for the complainant, all went to show that more than 1400 acres was unrestricted and available for factory and industrial purposes, whereas the entire Village (*including* the streets and parks, Municipal Buildings, Churches, schools and already built up territories) constituted a total of approximately 7400 acres.

The complainant's witnesses conceded that this was a proper and welfare-serving ratio, because it resulted in the ratio of approximately five to one (7400 to 1400), which is the generally accepted ratio most desired. (Kindly note: Upper half of page 94 of the Record, Kunkle; bottom of 111, 112 and 114, Whitten; Ambler's own testimony on page 143, all in printed Record).

It was exactly the *ideal* ratio which was attained by this ordinance.

The complainant and its witnesses conceded that such a proper balancing of labor supply would result to the benefit of and would *enhance* the value of the industrial and factory land itself. (Please note bottom of page 90, Kunkle; upper part of 110, bottom of 115 and top of 116, bottom of 119 and top of 120, Whitten; pages 180, 181, 182 and 186, Greenlund; all in printed Record).

Under these circumstances the Village feels that it is justified in pointing out that in addition to the many features of this ordinance which have already been shown as being related to the safety, health and welfare of the community, this particular provision is an additional evidence of the close relationship between this ordinance on the one hand and a greater public welfare, and more healthful conditions on the other hand and it shows an increasing value for the complainant's land.

Why set back provision was adopted.

Investigation brought forth the statement from long experienced fire authorities, that the most reasonable and certain way of preventing widespread conflagration is by requiring the greatest possible distance between buildings and structures on one side of each street and those on the other side thereof, commensurate with a reasonable use of the land. (Kindly note fire chief Ballou's testimony in the concluding lines of the first full paragraph of page 123 and page 207.)

The municipality did not have the right to do this so far that it would be charged with confiscating the land along the front of each street, but it was felt that it not only had the right but that it owed the duty to create this setback line as a very manifest exercise aimed for the safety and general welfare of the community. It was felt that to do less would be unwise. Such protection and preventative measures are appropriate and proper even where there is an adequate supply of water and more so where the supply is inadequate. In Euclid Village the two great railroad highways traverse the entire length of the municipality and here, especially throughout the dry season, the sparks from the locomotive add to and increase the danger and create a greater possibility for an unchecked and village-wide fire.

May we refer to the fact so generally known as to be within the realm of Judicial Cognizance—that each year witnesses great sections of large cities and almost the entire area of smaller municipalities completely destroyed and laid to the ground by devastating fires which it is found impossible to check and control because the flames and more particularly the heat leaps from one side of streets to the opposite side and from block to block, whereas much of this could be prevented and lessened if there were greater spaces between the buildings on one side and those on the opposite side of the thoroughfare.

This set back provision was not for the purpose of obtaining land for street widening or for any purpose of Eminent Domain. There was no allegation or proof thereof but the contrary was shown. (Middle of 105.)

PROOF SHOWS EUCLID AVENUE NOT BUSINESS OR INDUSTRIAL STREET IN VILLAGE.

In considering the action of the council in the passage of the ordinance, it must be borne in mind that except at the junction of Chardon Road and Euclid Avenue (which is the so-called "Center" of the Village) there is not an industry or store or place of business of any kind along either side of Euclid Avenue; in other words, there is not a single business along this seven miles of Euclid Avenue frontage, figuring both sides of Euclid Avenue, except this one cluster of stores, so that the claim that Euclid Avenue at the present time through Euclid Village is a business street is not justified. (See 5th to 10th upper lines of page 187; bottom of 103; third paragraph on page 100 and middle of 171). And every building along this seven miles of Euclid Avenue is a *residence* excepting this small cluster of stores at the Center of the Village, and this is true though Euclid has eight to ten thousand

inhabitants (page 103). And yet the Trial Court, at page 309 of 197 Federal Reporter, wrote:

> "From the public square in Cleveland * * * including spots in and beyond Euclid Village, Euclid Avenue has become the great business and Commercial street of the metropolitan area of Cleveland and such, the evidence shows, is its natural, obvious and ultimate use within and beyond the Village of Euclid."

We respectfully submit that this may be its *ultimate* use, but we earnestly do not feel that the proof showed that this was its *present* use. Indeed, as to the "natural and obvious" use, we need but refer to the plaintiff's principal witness who, at the last paragraph of page 92 of the Record, plainly said:

> "The *natural* and *logical* way for development of that property immediately north of Euclid Avenue (and the Supreme Court now knows that is where complainant's land is located) is by allotment for workingmen's homes. I believe it is desirable to have a workingman's home so near this development of property there; I believe that is the *best* place they could put them." (Italics supplied.)

And this was re-affirmed by the defense witnesses—Greenlund at middle of 181; Laronge at just above and below middle 199; Stein at 128.

In this connection it may be well to point out to the Court that even though some other limitation of this 620 foot strip might appear to be a wiser limitation, yet the wisdom or lack of wisdom of the present limitation is not to be determined by legal proceedings, if there is any relation between the regulations as now established and the safety and health and general welfare of the people at large. This is the established doctrine as shown in the latter portions of this brief.

If at any time in the future, the present conditions as to the frontage of Euclid Avenue change and render it more desirable from the standpoint of the interests of the owner as well as the safety, comfort and general welfare of the people, the Court may properly rely upon it that council, acting in the interest of the people, will again exercise the police power to meet such change by amending the restrictions; but the council had before it in the passage of the ordinance a certain condition and has drawn the restrictions in accordance with that condition which, in its judgment, *now* meets the best interests of the people under the limitations fixed for the exercise of the police power.

Though Railroads have been there for all these years, there are only 16 industrials in total, and not one has built along or near street line.

The Bill of Complaint makes reference to the fact that the New York Central Railroad was built about 1850 and the Nickel Plate Railroad was built about 1880 and that these two lines have, ever since such respective dates, run from the most westerly to the most easterly limits of the Village of Euclid.

Though these railroad facilities have been in existence and available for the respective periods of 75 years and 45 years, it is a fact that there are but 16 industrial plants in the entire Village of Euclid, notwithstanding that these railroad facilities of these two prominent railroads have afforded opportunity for the building of such plants for more than a half century. And in this number of 16 industrial plants, is counted even the most humble and smallest so-called industrial.

It is a further fact that not one of these industrials has been located so near to Euclid Avenue or so near to

St. Clair Avenue (which parallels the New York Central line about 1600 feet north of the Lake Shore Railroad) as the ordinance itself permits. (See Mayor Zimmerman's testimony at middle of page 171 and Inspector Stein's at lower portion of 103 and Mr. Ambler's admission at 14th last line of page 141.)

Each industrial has, of its own accord, chosen to build nearer to the railroad than allowed by the ordinance.

The industrial plants have, by their own example demonstrated that they are most advantageously located when *close* to the railroad tracks, and the location of each and of all of these industrials, proclaims the fact that not one has chosen, during all of this half century or even during the great industrial expansion of the last six years, to build so near to the street lines as the ordinance itself permits.

We bring this to the attention of the Court, at this time, because we believe that it has a persuasive effect in reference to many of the assertions which may be contained in the Brief of the Plaintiff.

Most of Village Homes in this Territory.

Referring to Plaintiff's Bill, the liberty is taken of saying that, contrary to the assertion of the Plaintiff that:

"The land in said Village north of Euclid Avenue has no special usefulness or adaptation to residence uses, except immediately along the Lake Shore," it is to be pointed out that the President of the Plaintiff Company allotted and restricted, for the purpose of residences alone, Mr. Ambler's own land, which parcel so allotted and so restricted is, in no way different from or located otherwise than the part which the Plaintiff now continues

to have. The part allotted by the complainant's president lies exactly the *same* as the parcel described in the Bill and is, in every respect, identical therewith. (Kindly note the 2nd paragraph on page 147 as testified by Ambler himself; the 34th and last paragraphs one page 101 and the upper third of page 102 and particularly the 10th and 11th lines of page 104.) It is not conceivably true that the territory claimed by the Bill to be unsuitable for residence use is really thus unsuitable for within that very territory lies the greater portion of the population of the village and within it are located the far greater portion of its homes and residences. (See pages 100, 101, 102 and 103.)

In addition, it is to be remembered that *every* building (except those at the so-called "Center" of the Village) located on either side of Euclid Avenue is a *residence* and in the allotments which run northwardly off of Euclid Avenue toward the Nickel Plate track and in the allotments on the hillside which run southwardly from Euclid Avenue, there are hundreds of houses, so that when the Plaintiff asserts in its Bill that the Euclid Avenue frontage "has no special availability for residence purposes" it apparently again asserts what its own president's conduct and what countless houses and unbroken residence streets indicate to be contrary to the facts. (See pages 100, 102, 103, middle paragraph of page 171, 34, 30, 29.)

Explanation of "Uses."

Uses 6, 5, 4 and 3 as indicated upon the map and in the Ordinance, permit of industrial and factory and commercial and allied purposes.

ALL land between St. Clair Avenue and N. Y. C. R. R. is open to and is unrestricted as to industrialism.

All of that great territory lying between the southerly side of St. Clair Street and the northerly side of the New York Central tracks is free and open and unrestricted territory for the development of industrial construction, except as to the few necessary minor exceptions hereinabove just referred to.

Approximately 98% of all the land lying between the south side of St. Clair Street and the north side of the New York Central tracks, is free and open to industrial development. (See Defendant's Map, Exhibit 2.)

And this is true in reference to all of that vast territory from the most westerly limits of Euclid Village to the most easterly limits of the municipality—3½ miles in length. (See page 126 of the Record.)

The other 2% is justifiably and necessarily restricted.

As to this vast extent of territory, so lying between St. Clair Road and the New York Central tracks, it must be apparent that all of the land which could possibly or reasonably be used for industrial purposes, has been left open and unrestricted for industrialism.

As to Land BETWEEN the two Railroads—100 Per Cent. allowed for Industrialism. Not a single plant has availed itself of right to build in this great Stretch of Territory.

Stepping then, across the New York Central Railroad line and walking toward the south, we come upon a great stretch of territory which lies *between* the south side of the New York Central Railroad and the north side of the Nickel Plate Railroad.

This territory of land has an average width of about 1600 feet and is bordered, on the north by the New York Central line, and, on the south, by the Nickel Plate Railroad. (Page 126, Engineer Pease.)

Again adverting to the dates set forth in the Bill of Complaint, it is to be pointed out that—except where the three intersecting (north and south) streets cross the railroad track, not a single industry of any kind or of any size has ever availed itself of the unrestricted opportunity to build in this great area which lies *between* the Nickel Plate track and the Lake Shore track which territory is three and one-half miles in length, making a total of seven full miles of unbroken Railroad frontage or 100% of all available land here. (Their witness—Witzel—at middle of page 160; the Inspector at second paragraph of page 109; Engineer Pease, 126; 2nd and 3rd paragraph of page 30.)

As to land SOUTH of Nickel Plate R. R.

Stepping across the Nickel Plate tracks, from the north to the south side of these tracks, we are confronted with another stretch of land which has an average but variable width of about 1800.

All of this land except the 620 foot strip or belt which faces immediately on the north side of Euclid Avenue and except where residences and buildings and streets are now located, is free and open territory for industrial purposes and for purposes accessory to and used in connection with manufacturing and industrial pursuits and that is true throughout the entire length of the Village except where intersecting buildings or streets have already been constructed. (Defendant's Map, Exhibit 2 and page 126.)

These three parallel stretches of land which we have just pictured—running throughout the *entire length* of

the Village—constitute all of the land which could reasonably be used or which is logically located for use for industrial purposes, and of this, 91% of the land now unoccupied is open to industrial and commercial uses. (Page 126)

98 Per Cent. is allowed for light and heavy manufacturing, north of N. Y. C. R. R. 100 Per Cent allowed between the two R. R's.

In one stretch, the ordinance permits industrialism to have 98% of the land and the 2% restriction is so manifestly necessary and required, that even the Plaintiff will not endeavor to quarrel with or to question that 2% restriction where these particular spots or locations appear or occur; while the full 100% is allowed between the two Railroads.

75 Per Cent. is allowed South of Nickel Plate R. R.

As to the stretch of land between the Nickel Plate track and Euclid Avenue, the ordinance permits a full 75% of the unoccupied and available land to be used for industrial purposes, through the entire length of the village. (See bottom of page 126 of the Record.)

The Bill of Complaint does not Square up with the Facts.

Is it not a fact that the Complaint of the Petitioner would lead a reader to believe that the limitations of this Zoning Ordinance have practically ostracized industry from the village and ousted industrial plants from the very territory where they ought reasonably and properly be permitted to be located?

The allegations in the Bill to the effect that there is an insufficiency of industrial land in Greater Cleveland and that therefore Euclid does not have the right to exer-

cise its Police Power was, patently, an assertion with no legal merit, but even if this picturization had been worthy in law, it met its complete repudiation in the proof, at middle of page 120, at 180, 186, at upper portion of 130 and at middle of 200 and their witness at lower half of 86 of the Record, all of which showed great acreage available in every direction about Cleveland.

If the Bill had been in keeping with these and other facts, Defendants would have been able to raise the Basic question of Constitutionality upon a Motion in the nature of a Demurrer and thus all testimony could have been spared. As it was, the defendants were compelled to right the misimpressions.

The great total of 14 miles of Railroad is freely and unrestrictedly allotted for industrialism.

It might be well to conclude by making the statement that the railroad frontage, in total, allowed for industrialism in Euclid Village under the ordinance, constitutes approximately *fourteen* (14) *miles* in length, comprising *1400* acres—an unusual amount. (Page 126)

A quarter century of building will hardly witness more than a mere "settlers entry" to this great territory of land which is open and available under the ordinance, for industrial development.

Statistical computations show that an average factory occupies, for itself and for its appurtenances and for its accessories, less than an acre of ground—room for more than 2000 *ground* floor factories is thus afforded in Euclid Village. In what other village are 2000 ground floor factories found?

But the Bill of Complaint alleges, in the face of all these facts:

"In effect this ordinance seeks to erect a dam and hold back the flood of industrial development, and by destroying all the value in land in the Village which arises out of its manifest availability for industrial development, forcibly changing the character of the Village."

Much of Complainant's Evidence irrelevant. Euclid Village has right to legislate for own needs.

Much of the complainant's proof relates to factory development far removed from the Village, in Cleveland (see lower portion of page 69 and top of 70; middle of 71) and in East Cleveland, and should be disregarded, except perhaps to show that there may be some tendency of this character toward the east. So, too, the Aerial Map offered by complainant is irrelevant in main.

But in the territory involved in this action under the zoning ordinance, to-wit, that stretch lying between Euclid Avenue on the south and the Nickel Plate Railroad, the proof shows that in this great stretch of over three and one-half miles there are only seven industries, including lumber and small coal yards. (Page 99 and top of page 100)

And each one of these industrial plants—even the smallest—is adjacent to the railroad and further removed from Euclid Avenue than is required by the Ordinance itself. (Last full paragraph on page 103)

Euclid is 9 1-2 to 14 miles from Cleveland

A: As stated in our Answer, Euclid—in the true sense—is not next to Cleveland but is merely next to a peninsula of Cleveland, for between Euclid and Cleveland's main land, lie the long and built up stretches of East Cleveland (several miles long) and of Bratenahl on the north (several miles in length) and then over a mile of Cleveland

Peninsula also intervenes. (See first paragraph of page 24 and 124.) The westerly or nearest line of Euclid Village is about 9½ miles from the Cleveland Public Square and its easterly line is the County line and is almost 14 miles from Cleveland's Public Square. Euclid is the most remote municipality from Cleveland, in Cuyahoga County.

B: Furthermore, it is respectfully submitted that so long as Euclid Village does nothing to injure Cleveland (such, for example as polluting Cleveland's water), Euclid has the full right to legislate in and to control within its own bounds as it deems best.

Indeed, Euclid could not legally legislate *beyond* its domain. Equally, then, Euclid can and may legislate *within* its domain as it deems best for its own safety and health and general welfare.

In connection with Euclid's right to legislate for itself and within its own bounds, we refer to: Article XVIII, Section 3 of Ohio's Constitution, which reads:

> "Municipalities shall have authority to exercise all powers of *local* self-government and to adopt and enforce *within* their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It must be quite evident that the recitations in the Bill and the attempted proof offered by the Complainant (as for example the lower two-thirds of page 69 and top lines of page 70) are irrelevant and of no pertinence in so far as they recite the need of Cleveland for more industrial land and in so far as they refer to locations of factories in Cleveland and not within the Village of Euclid.

The alleged need (though it really does *not* exist) in Cleveland for more factory land, can not control or bind Euclid. (Pages 180, 191, 200, 120, 130 of the Record show the very large acreage in and about Cleveland available for industrial use.)

ARGUMENT.

THE PHILOSOPHY OF ZONING.

The Euclid Ordinance is a comprehensive one, in that it covers the *whole* territory of the village, it divides that territory into use, height and area districts, each with its designated standards of use, heights and area, all based on a comprehensive survey of existing conditions and tendencies and estimates of the future needs of the community in the way of residential, business, industrial, recreational and civic developments.

There are many types of ordinances which are erroneously referred to as zoning ordinances. Confusion results from failing to distinguish between the constitutional basis of these other types. It is noteworthy that neither in most adverse briefs nor in adverse arguments do those opposed to Zoning Ordinances, cite cases in which a Zoning Ordinance, in the *true* sense of the term, has been involved. Error alone, however, can result from failing to distinguish the constitutional questions involved in a zoning ordinance on one hand and, on the other, ordinances regulating the use, height or area of buildings within certain blocks or streets or intended to merely maintain the exclusiveness of some selected part of a city.

For example, a very customary type of ordinance is one that seeks to protect existing residential blocks or neighborhoods, by defining what is a residential area and prohibiting certain designated businesses or industries in that *one* block or in that one territory. This sort of ordinance is more properly termed a "block" ordinance; but it is not zoning. It does not district the *whole* city by means of a map, allotting each type of use to its most appropriate territory for the *welfare,* safety and health of the community. In effect, such an ordinance permits the existing residential users of any neighborhood to dictate

the future use of that neighborhood, even though a comprehensive survey of the city's needs might demonstrate that neighborhood as one which should be open to non-residential uses. In other words, instead of being—as the zoning ordinance is—a comprehensive distribution of the whole territory of the community among all the different uses, each with appropriate standards of height and occupancy, from the point of view of community results in the way of *health, safety* and *welfare*, the block ordinance simply—perhaps arbitrarily—fastens down the existing use of selected neighborhoods; thus, in effect, permitting the existing users to exclusively decide for what purpose the undeveloped property in their neighborhood may be used. It will be found that most cases of building regulation cited by those opposed, involve an ordinance of this "block" type and not a zoning ordinance; and in most of these cases there was the additional element that the regulation was made conditioned upon the voted consent of property owners, thus introducing a question of delegation of legislative power, or of whim and caprice.

Again, there are ordinances which prescribe a maximum height limit generally *throughout* the entire city, without any attempt to intelligently survey the whole territory of the community, without any estimate of future needs in the light of fire, congestion and accident situations and without effort to adapt the height restrictions in the various districts to these needs. This sort of ordinance may or may not be constitutional, but it is at least arbitrary as compared with the comprehensive zoning ordinance, which carefully adjusts height limitations to a carefully wrought plan of districting and to a fully considered plan aimed and designed to prevent present and future accident and congestion contributing conditions and aimed and enacted solely for the safety and *welfare* of the *community*.

Such a comprehensive ordinance and survey and study is exemplified by the reports of the New York Commission which so carefully studied the entire New York City situation—just as was done in Euclid Village—before the Zoning Ordinance was enacted. Please see last paragraph of pages 71-72 and 73; the lower part of pages 27 to page 32; page 56 and upper part of 57, of "The *Partial* Report of the Commission" of New York, under date of December 1913, and pages 3 to 5 and Chapter II, pages 6 to 14, and the Chapter on "Use Districts," pages 15 to 25 of the *Final* Report of the Commission on Buildings, Districts and Restrictions, of New York, under date of June, 1916. These pages are very illuminating and are valuable contributions of thought, data and expression. Copies of these two Reports have been sent to the Clerk in order that the Court may the more conveniently refer thereto. May we invite the Court to the last paragraph of page 29 and pages 30 and 31; "Necessity for Districting" on pages 56 to 59 of the Final (1916) Report. The organizations which approved these Use and Districting Regulations are most interesting—pages 73 to 76; the Statement of Thomas Addams, Town Planning Advisor, Commission of Conservation, Ottawa, Canada—as set forth on pages 77 to 80 is a scholarly and worth-while discussion and in it Mr. Addams sets forth the need of these regulations *before* the municipality is built up and before the welfare and safety conditions have been thwarted; page 89 describes the ills in respect to distances which workers must travel because the labor supply is far from the improvidently located factories; pages 88 and 90 show the resulting street car and vehicular and sidewalk congestion; the suburban situation is pointed out at the bottom of page 93; Juvenile delinquency is linked up with a lack of districting and regulation in the interesting statement of Ernest K. Coulter, Superintendent of

The New York Society for the Prevention of Cruelty to Children—found on pages 99 and 100; the diminution of accidents resulting from a Zoning Ordinance is apparent from the contribution of Edmund Dwight of the Employers' Liability Assurance Corporation, which appears on pages 101 and 102; Abram I. Elkus, former counsel for the State Factory Commission, on pages 102 and 103, offered a version as to Zoning Ordinances and districting which is worthy of being read; Dr. Haven Emerson, Commissioner, Department of Health, at pages 106 and 107 as well as on pages 8 and 9, emphasized the need of Zoning and Districting; Mr. George C. Whipple, Professor of Sanitary Engineering, Harvard University, at page 10, spoke of the effect of keeping industry and trade from residential sections. His Statement is but a very few lines but it is a unique summation of the subject. No less brief and interesting is the paragraph quoted on page 10 from Dr. G. F. Boehm, neurologist. The beneficial effect of use districts by way of segregating different kinds of traffic, the need for Zoning and Districting, the increased cost of streets resulting from lack of Zoning, the development of slum areas attributable to the absence of Districting, the ill effects—by way of danger—resulting from stores in residential streets, the increased freedom from fire dangers which would result from Zoning and the stabilizing of land values are splendidly portrayed, on pages 143 to 147, by Mr. Nelson P. Lewis, Chief Engineer of the Board of Estimate and Apportionment. A reading of this Final Report of The New York Commission and a study of the many photographs can hardly fail to convince the reader of the need for Zoning, of its importance before a municipality is too built up and of the intimate relationship between Zoning and the Health, Safety and Welfare of the community.

This brief is restricted to the comprehensive type,—that being the type which is involved in this case,—enacted for the sole purpose of defending and providing for the Safety and General Welfare of the Community.

The word "Zoning" is perhaps unfortunate in that it may convey the idea of large, more or less concentric zones. "Districting" would be a more accurate term. In the *comprehensive* plan, the whole territory of the municipality is divided into districts, some of which may be large, some as small as one block or one side of a block, each with its own standards of use, height and occupancy, each selected by virtue of the consideration of the *community* health and general welfare as applied to that particular district; the whole constituting a comprehensive plan for the best manner of conserving and assuming the greatest safety and welfare of the *whole community.* Existing uses of a district are taken into account, but are not necessarily decisive. The *comprehensive* plan is obviously more reasonable than any "Block" ordinance.

REASONABLENESS IN THE PREPARATION OF A COMPREHENSIVE ORDINANCE.

We do not mean to say that every ordinance which covers the whole territory of a municipality and divides it into use, height and area districts is necessarily constitutional, regardless of whether it was arbitrarily or intelligently worked out. If the preparation of the ordinance be attended by no survey of the existing situation, no attempt to study the city's problem, no attempt to adjust the provisions of the zone plan to the city's needs in the way of health, safety, prosperity, welfare, and the like; but be simply a piece of guess work, then such an ordinance might not be reasonable; for "reasonable" in constitutional law, means that there has been a genuine at-

tempt to apply the processes of intelligence to working out the accomplishment of the purposes of the measure. The evidence in the case at bar, however, clearly shows that there was such a conscientious, thorough, unprejudiced, careful work of study, investigation, survey and inquiry in the Euclid Village ordinance. The plaintiff has introduced no evidence to show that it was arbitary in the sense of absence of care or absence of genuine application of thought. (Pages 167, 168; lower half of 205 and upper half of page 206; upper half of 39 and upper half of page 41 of Record)

THE QUESTION OF CONFISCATION.

Nor do we mean to say that even in a comprehensive ordinance a particular provision as applied to a particular piece of property might not be unconstitutional because unreasonable in its application. On the question of unconstitutionality of zoning, however, the element of confiscation is quite confusing. For example, a particular tax may be confiscatory and for that reason may be invalidated in an action involving the collection of the tax; but that fact does not demonstrate the non-existence of the *power* to tax.

A particular rate imposed on a particular utility is sometimes invalid because confiscatory; but that does not mean that the legislature has no rate-making *power*. Similarly, a particular zoning provision may be confiscatory as regards a particular piece of property; but that cannot mean that the community has not the power to zone. This factor of confiscation may be an issue in some cases; but it cannot be an issue or useful in determining the question whether zoning falls within the constitutional scope of legislative *power*. That a legislative power may be abused to the point of confiscation does not disprove

the *existence* of the *power;* and this is as true of zoning as of taxation or of any other type of legislative power.

The complaint of confiscation is usually based on a "begging of the question."

In considering the charge of confiscation, which is so easily made and so habitually used by those who attack and resist legislation, one fallacy is to be avoided—a fallacy into which we believe plaintiffs have fallen. We refer to that begging of the question which consists of disproving the existence of a legislative power by assuming a right to be free from such legislative power. The question before us, for instance, is whether the community has the *power,* in a zoning ordinance, to restrict property to certain uses for the purpose of protecting and best assuring the health, safety and general welfare of the community.

To contend, as plaintiff seeks to do, that there is confiscation or damage because the property was acquired for a non-residential use and that that purpose of acquisition would be impaired, is a begging of the question, if the limitation is for the public welfare, health and safety.

One cannot speculate upon a community's not exercising its constitutional police power and then claim unconstitutional destruction of property rights when the community does exercise its constitutional police power.

The individual cannot, certainly by its selection of property for investment, determine whether or not the community shall or may exercise its constitutional legislative powers. Every statute relating to property creates some change in the manner in which such property may be used or developed and in the financial results of its ownership or use.

To call change confiscation, would be to deny all legislative power over property. To contend, as plaintiffs seem

to do, that future speculative value of their property for industrial purposes is entitled to freedom from all legislative treatment, is arguing in the same sort of vicious circle and is a begging of the question just exactly as the now discredited claim that a new public utility rate, imposed by legislation or commission, is confiscatory when it deprives the utility company of a fair return upon a franchise value representing the capitalization of the company's earning capacity under the old rates. In the language of the Supreme Court in a utility case,

> *Cedar Rapids Co. vs. Cedar Rapids,* 233 U. S. 655, 669:
>
> "If the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the 14th Amendment, then the power to regulate is null."

Similarly, if the maximum possible future value of unregulated property may not be interfered with by law, then all legislative power over property would be destroyed.

Whatever "confiscation" may mean in the constitutional sense, it cannot refer to that effect on future or speculative or even present values, which is a necessary incident to the existence of the police power. Nor is substantial depreciation of present value necessarily confiscatory, as appears from countless cases arising under the police power, of which we cite only *Hadacheck vs. Sebastian,* 239 U. S. 394, where the evidence tended to show a possible depreciation of $300,000.00 in the value of land used as a brickyard as compared with its value in the event of the exclusion of such use (the land having been placed in a residential district), and nevertheless the Supreme Court of the United States upheld the decision of the lower court. This attempted issue of confiscation

would appear to be irrelevant and confusing in connection with the question of the *constitutionality* of zoning; and, we believe, as hereinbefore pointed out under the "Facts," that confiscation was not demonstrated as being the effect of the Euclid Village ordinance on the present value of plaintiff's property.

What PROOF of damage or confiscation?

We beg the privilege of concluding this particular subject by repeating what we have hereinabove stated—that though confiscation would not prove the lack of the *power* to zone and to legislate, and though confiscation is quite irrelevant to the subject of the right and power to so legislate—yet even if confiscation were relevant as to the power to enact this ordinance, there is no clear or convincing proof of confiscation. On the contrary, the proof on the part of the complainant's own witnesses and the testimony offered by the witnesses for the defense must be said to have robbed the complainant of the right to claim that this ordinance results in any damage or confiscation of complainant's property or values.

One needs but to read the simple and plain admission of their chief witness (Kunkle) toward the lower portion of page 92 of the printed Record and the testimony to which reference was made earlier in this brief under "Facts," to find convincing answer to any allegation of damage or confiscation; concluding lines of page 92, middle of 93, concluding paragraph of 180, top of 181, upper part of 182, middle of 186, upper part of 194, 128, 131, 132, 197, 198 and 199.

If this be true—and we earnestly believe it to be so—then the question of the reasonableness or the unreasonableness of the particular line established by the ordinance is really foreign to the issue.

THE BASIC QUESTION.

Otherwise worded, the issue is really freed from the question of the reasonableness or unreasonableness of the particular restriction and the subject really narrows down to the sole and completely *legal* and *fundamental* question as to whether there be a *constitutional power* to enact such ordinances as the one in question.

Frankly, this is the question which countless people who live in territories now zoned, are awaiting to be decided.

Secretary Hoover's Department—from its division given over to this subject of zoning and housing—has declared in its most recent Bulletin that approximately Twenty-six Million people are now living within territories zoned in the various municipalities of the United States, which comprise cities in 41 of the states (see Department of Commerce Publication under date of August 1925, at page 140 in supplement hereof).

This Court is being looked to, in this action, to determine whether Zoning Ordinances may be legally enacted under the Constitution of the United States.

It is the hope of the Counsel for the defendants and of people in many states and cities, that this Court may find it proper and fitting in this action to determine this fundamental and basic question.

First Zoning Ordinance in 1916—In New York City.

At the conclusion of a most thorough investigation by the authorities of the State of New York an Enabling Act was enacted by the State of New York for the City of New York alone. By virtue of this Enabling Act, New York City enacted its Zoning Ordinance in 1916.

Data Before Euclid Commission.

This report of this New York Investigating Commission was, of course, available to the Commission at Euclid Village, as many other reports and such other data, gathered by other Commissions and cities of the United States, were likewise open and available to and were used by the Euclid Commission.

Persons and property owners from every walk of life were invited and were heard and were heeded by the Commission. (Middle of page 205 of the Record)

In the several years the Euclid Zoning Ordinance has been in effect, none but one other appellant has ever filed suit, and this was decided in favor of the Village (top of page 208).

More Growth in past two years than ever before.

We believe it is but fair to make reference to that fact because the ordinance has been in effect for three years and because—during those years—there has been more growth and more building in the Village of Euclid than in many combined years theretobefore and there has been much more growth and building than in any other years theretofore—Two and three quarter millions in Homes in 1922 and 1923 (see upper part of page 105 of the Record).

And, too, the ordinance has been found to be ample and equitable and up-building and has been conducive toward a better safety, an ultimately more healthful condition and a greater public welfare (lower portion of page 207).

This Ordinance fulfilled the judgment and advice of the experts brought before the Commission by the Railroads and Industrials themselves.

The Zoning Ordinance permits approximately 1200 feet from the railroad track—toward Euclid Avenue—to be used for industry and the like and that very line of 1200 feet was adopted and ordained as being for the general benefit and welfare of the community and of all concerned, because the so-called industrial interests of their own accord, brought nationally known authorities and men whose judgment in reference to industrial plants, is recognized throughout the entire country and these experts, brought by the industrials themselves, testified before the Euclid Village Commission that the *ideal* and the *desirable* depth from the railroad for even the largest industrial plant, would be about 1100 feet and in obedience to and with respect for the judgment of these experts, the latitude allowed for industries was moved until it reached and *fulfilled* the very ideal suggested by these experts and the Ordinance was therefore amended in that respect to meet that ideal, because the Euclid Village Commission felt that this ideal could be permitted and reached without sacrificing the safety, the health and the general welfare of the community (lower half of page 206 and lower part of page 167 of the Record).

Apparently the Commission was correct and apparently the experts brought by the industrial interests were likewise correct, for—as indicated during the three years since the Ordinance has been in effect and as indicated by the years theretofore, no factory or industry—large or small—has ever built or has even applied for any permission to build nearer to Euclid Avenue than is permitted by this Zoning Ordinance. (103)

Why so many other places have adopted zoning.

But zoning has not been restricted to the State of New York alone, for, on the contrary, it has been found—by those other big and small cities of the country which have watched and followed it—to be not merely advisable but to be virtually *necessary* in order to truly and really create a municipality of health, of safety and of welfare.

Some of cities Zoned—All having IDENTICAL Ordinances.

Washington, D. C., Detroit, Pittsburgh, Cincinnati, Columbus, Omaha, Baltimore, Boston, Albany, Buffalo, Rochester, Ithaca, Toledo, Lima, Mansfield, Portland, Ann Arbor, St. Paul, Memphis, Newport, Salt Lake City, Seattle, Los Angeles, New Orleans, Minneapolis, Youngstown and Providence, and more recently Chicago are among some of the comparatively larger cities which have adopted comprehensive zoning ordinances.

Most all Large Cities are now Zoned.

Twenty-seven of the thirty-three cities which have population of 200,000 or more, have enacted Zoning Ordinances. (See Department of Commerce Bulletin of August 1925, on Supplement page 140 hereof.)

State after state have enacted Enabling Acts.

Within recent months, Connecticut, Delaware, Iowa, North Carolina, North Dakota, Oklahoma, Wisconsin, Wyoming and Pennsylvania have enacted State Enabling Acts and a number of other states have supplemented and amended their own Enabling Acts upon Zoning.

So that, as this brief is being dictated, there is not a part of the country—from the conservative and careful East to the freer Pacific states—which has not already

witnessed the benefits and the health, safety and general welfare results which are to be derived from zoned municipalities.

All Enabling Acts and Zoning Ordinances are substantially alike.

We make mention of the fact that almost each state Enabling Act is of practically the same phraseology as is the Enabling Act of Ohio, which is found in Section 4366-1 to 12 of the General Code, and more particularly in Subsections 7-8-9-10 and 11 thereof.

In fact, they are uniformly framed after the so-called "model" Act issued and sponsored by the Department of Commerce at Washington.

So, too, it will be found that almost each one of these ordinances is almost identically like each other one, except as to local names and situations.

Almost each one of these ordinances and certainly those of the cities which we have mentioned and many others which would go to make all too long a list—have created the very Use and Height and Area districts which are likewise created in the Euclid Ordinance.

Department of Commerce and Colleges are fostering zoning.

Congress, itself, has created a Department under the Secretary of Commerce which is intended and which is acting as advisor to municipalities throughout the entire country in reference to the subject of zoning.

It has written the model for most State Enabling Acts and for many municipal ordinances.

Twenty-six Million living in zoned territories in United States.

The most recent pamphlet, issued in August 1925 by the United States Government, shows Twenty-six Million people in the United States within zoned municipalities.

Harvard College has appointed a Secretary for the purpose of looking after the subject of zoning and allied subjects affecting municipalities throughout the country.

England makes zoning mandatory.

In England zoning was *permitted* until 1919, at which time, by an Act of Parliament, it became *mandatory* upon every city which, on January 1st, 1923, would have twenty thousand or more population. (Part II of 9 Edward VII, ch. 44 and Part II of 9 and 10 George V, ch. 35 of the Town Planning Acts of 1909 and 1919—Law Journal Public General Statutes of 1919.) (Kindly note The Law of City Planning and Zoning, by Frank Backus Williams, pages 409, 408 to 517, 518 *et seq.*)

And it is but fair to say that in England, the doctrine of Eminent Domain now generally applies with the same force that it does in our own country, so that zoning in England, without compensation, would be no more legal than it would be in this country if the zoning were held to fall within the province of the exercises of Eminent Domain instead of falling within the realm of the Police Power. (In this connection please see Statement of the Canadian Commissioner of Conservation on page 77 of New York's Final Report.)

Zoning is now widespread, because of health and welfare.

By reason of the widespread influence of zoning throughout the United States and by reason of the fact that it has been limited to no mere one section of the country and to no mere one state or group of states, but

that, on the contrary, it has been adopted literally, from coast to coast, from the Canadian to the Gulf lines, and by reason of the further fact that most of these ordinances have been adopted only after it has become apparent that there is a virtual *necessity* therefor and because there is so close an intimacy and so close a relationship between zoning on the one hand, and the health, the safety, the convenience, the prosperity, the comfort and the general welfare on the other hand, and though the validity of a Police Regulation is not to be rested simply upon popular opinion, it is, we believe, quite proper that we should cite the pronouncements of the Supreme Court, found in 167 United States, 518, *Canfield vs. United States:*

Strong preponderant opinion has its effect.

> "It may be said in a general way that the Police Power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong or preponderant opinion to be greatly and immediately necessary to the public welfare."

Congress has enacted a zoning ordinance like Euclid's.

As hereinbefore pointed out, the United States Congress has decreed that it believes that zoning has so close a relationship to health, safety and phases of general welfare, that, by act of Congress adopted on March 1st, 1920, found in U. S. Statutes at large, page 500, being United States Public Act No. 153 of the 66th Congress, a zoning act was passed for the District of Columbia.

And this Zoning Act, to all intents and purposes, is like the one in Euclid Village and it contains the Use restrictions, the Area limitations and the Height regulations, in almost the *identical* manner in which they are found in the Euclid Ordinance.

State after State and City after City and Congress have adjudged zoning to be legal and constitutional.

One state, impelled or inspired by a few bold or rash or intemperate men, or one municipality under the leadership of some momentary leader might enact an Ordinance and not much could be said to the effect that such an example—so standing alone—indicated any great consideration in favor of the constitutionality of such an isolated enactment.

These very zoning acts have been adjudged and decreed to be legal, valid and constitutional exercises of the Police Power—without compensation and as distinguished from Eminent Domain—by not merely the Village of Euclid, by not merely the State Legislature speaking through the Enabling Act of the State of Ohio, by not merely the Ordinances of well nigh on to four hundred other cities in the United States, by not merely more than a score of the States throughout the Union, but by the Federal Congress as well.

It means that after careful consideration by each of these many states of the Union and after full investigation, and that on the part of the hundreds of municipalities—including most of the largest in the country—and after discussion by the many legal minds in Congress, each of these law making bodies of these state and municipal Commissions arrived at the conclusion that zoning ordinances are not repugnant to the Federal Constitution but, on the contrary, are in harmony therewith. (A chapter is devoted to the question of constitutionality in the New York Final Report, page 51 to 72.)

These legislative bodies—municipal, state or Federal—would not have enacted the respective Ordinances or Enabling Acts if they had not believed the same to be in conformity with their respective state constitutions as well as in keeping with the Federal Constitution itself.

AS TO THE RELATIONSHIP BETWEEN THE ZONING ORDINANCES AND THE SAFETY, HEALTH AND GENERAL WELFARE.

Zoning increases values and tends to greater safety, etc.

It is the earnest belief of those who have studied Zoning, that instead of zoning ordinances resulting in a lessening or in an unfavorable infringement of the rights or of the values of any property, the *contrary* unfolds itself, eventually, as being the truth.

Many cities report that some of the original stoutest objectors have since become the most ardent supporters of zoning in their respective municipalities, because zoning naturally results in benefiting most land and property and in injuring none, and in this way, it not only prevents depreciation of all sections by intrusion of value-reducing conditions, but it, in addition to all that, gives so much greater opportunity for health regulations, so much more sensible and systematic and therefore community-serving opportunities for a much greater safety and it spells out a situation for a much greater general welfare. (Kindly note testimony to this effect at top of page 148; also pages 170, 171 and 168 showing how land values are injured because of lack of Zoning Ordinances and giving computations of the N. Y. Tax official in support thereof; and the similar statement of Mr. Clarence H. Kelsey, President of The Guarantee Title and Trust Company. All of these appear in the Final Report of New York.)

The simple example given by witness Laronge in the first full paragraph of page 204 and the picture given by their witness at lower portion of 162 and upper portion of 163 of the Record, will aid to illustrate one phase of this situation as to the increased value to the property holders and to the municipality which comes from zoning ordinances.

Residences which have been built in such factory-intended territory as pictured by the witness, are likewise seriously depreciated and reduced in value, as these houses find themselves the beneficiary of adjoining smoke, noise, odors, congestion, heavy traffic and all of the other effects which are attendant upon factory construction and factory operation. All of this is subversive of the health and welfare of the community. (Kindly note Mr. Whitten's testimony at lower portion of page 110 and all of pages 111, 112 and 113 of the Record.)

If the municipality had enacted a zoning ordinance, it would have defined this ideally situated industrial land for *industrialism* and then there would have been one great stretch which would have been developed for manufacturing and for parallel "Factory" streets, and this would have meant a very much greater value per acre or per square foot for manufacturing, than where this land is broken up by intervening allotments and by built up houses and where it finds itself neither a desirable industrial nor certainly a desirable residential district. (Please see middle of page 57 of the Final New York Report.)

So, too, householders would certainly not have built their homes in this territory because they would have seen and would have known, and would have been served with Ordinance notice, in *advance,* that this stretch of land was intended and ordained for industrial purposes and there would not have been a great number of residences found in the condition of having a full half of their value torn away by the advance of factories. (Page 77 of New York Final Report of 1916.)

New York City witnessed a most astounding loss of taxation values as to its public treasury in addition to an unbelievable loss to the private property owners when, along the lower portion of Fifth Avenue, its garment fac-

tories with the army of garment workers invaded the then high class shopping and retail district which was located along this lower portion of Fifth Avenue. (Lower part of pages 71 and 72 of 1913 Report of the New York Commission.)

Values fell to less than half, stores ran race with each other in vacating their then locations and in seeking other sites and the property owners found themselves despoiled of a great fraction of their property values. (See photograph "Figure 53" on page 116 of New York Final Report and pages 110 and 111 thereof.)

Little wonder, then, that the shopping district "took to its heels" and in its place stands what may be rightly termed a "semi-blighted" territory. And—as is inevitable—in the wake of this flight came poor and unfit working quarters and even poorer and less fit living quarters in the deserted and neglected buildings from which the former occupants had taken leave.

Here was another fertile field for the Workshop Inspector, for the sanitary police and the juvenile court and the truant officer and here was another addition to the city's "unfit" districts. This is but another picture of the many phases that zoning aids, for, by preventing such destruction, zoning *stabilizes* instead of destroying or lessening values and zoning results in financial gain to the property owners as well as to the public.

One intrusion without ordinance, steals neighbors' values.

But the difference between this transition under a zoning ordinance and the transition which takes place without a zoning ordinance, is perfectly apparent; for, without a zoning ordinance, a mill or a junk yard or a butcher shop or cement block factory or a paint factory or a tin shop owner buys in a business or in a residence

district, even while that district is in its prime and at its zenith, and over night, this one intrusion steals from each other property owner and from everyone thereabout, a considerable portion of the value of each parcel.

Under zoning, the territory is opened to the shop keeper or to the store-keeper only when and only as public consideration and general welfare and as the general trend dictate and the necessary enactment would naturally be voted only when the residence district becomes obsolete or has grown to be worn out or when it presents a situation where the *general* welfare would be better served if trades or factories or other uses were allowed to come in.

One selfish shop can not destroy other values, under zoning.

This means that instead of the districts being invaded during their prime or whenever it satisfied the selfishness of some one intruding individual, which would necessarily result in a destruction of values and a blighted territory, they would be revised under a zoning ordinance and the values would then—in all probabilities—be at a stage where there would really be an increase of value by the incoming use, which would mean a *benefit* to those which were coming in and which would mean no loss but rather a gain to the present owners, and all this would be markedly in favor of a greater public welfare.

Blighted territory means very closest relation to health and welfare, for it usually means poverty districts with all its ills.

The evidences are so common and so easily recognized that one is not surprised to find that the New York Commission wrote:

> "There is an intimate and necessary relation between conservation of property values as here pro-

posed and the conservation of public health, safety and general welfare.

"Throughout a city the areas in which values have been depressed by the invasion of inappropriate uses or lack of building control, are the areas in which the worst conditions as to sanitation and safety prevail and where there is the greatest violation of the things essential to public comfort, convenience and order. *The decline in property value in such districts is merely an economic index of the disregard of essential standards of public health, safety and convenience in building development.* Moreover, a depressed district of changing occupancy is almost always a district in which unwholesome home and work conditions prevail. The old building altered to suit a new use is usually very faulty in light, air and sanitation. Declining values make it difficult or impossible to enforce proper standards. *These depressed districts create the most difficult and perplexing problem in the establishment and administration of housing and factory regulations.*" (Page 14 of the Final Report of the New York Commission, 1916)

Zoning prevents huddling and indiscriminate throwing together of homes and factories and stores.

The blighted territory is concomitant with and is an index to the locality where all too frequently crime, vice, congestion and sickness are found to be the rule. (See pages 13 of New York Final Report.) Zoning, by its prevention of huddled houses without adequate provision for open spaces and in preventing dwellings, stores and factories being indiscriminately thrown together, becomes a potent force for the health and safety and general welfare. (Pages 21, middle of 56, top of page 146, middle of page 205 of New York Report, and lower portion of 110, 111, 121; upper portion of 184 of the Record.) And congestion means greater fire hazard, which it is the duty of

every municipality to prevent. (Page 139 of New York Final Report where is found Fire Chief Kenlon's statement.)

"Balanced" territories mean better condition of welfare and safety and health.

There is another large field which we believe ought to be called to the attention of the Court, and that is in reference to the now recognized necessity of having a "balanced" or "combined" territory instead of all one kind or all the other. We refer to the fact that if Euclid Avenue is permitted to be lined with industrials, factories and the like, it will mean that the street car service and the vehicular traffic will be congested during the morning hours and when it comes time to report for factory work and during the evening hours when quitting time arrives.

Whereas, if residences are not driven out or made unwelcome, there will spring up a "balanced" construction of residences and of industrials, which will mean that the vehicular and the street car congestion will be much less than if the whole territory is given to factory purposes, for then the householders will be able to walk from their nearby homes to the nearby factories and thus congestion will be greatly relieved, or the householders will find themselves going *down* to work on the comparatively empty cars and along the comparatively uncongested vehicular-side of the street, while the factory employees will come out upon those same cars or in vehicles on the other side of the street.

This will essentially lead to a lessening of congestion, both vehicular and in street cars. (Mr. Turner's statement at the middle of page 9 and page 31 of New York Final Report.)

The New York Commission, after resorting to most careful inquiry, found that the ratio of congestion in street cars is an index to the ratio of increase of communicable sicknesses. (Commissioner of Health, Dr. Haven Emerson's statement at bottom of page 8 and page 9 of New York Final Report.) The same commission and many other sources of information clearly show that this so-called "balanced" vehicular traffic, with part going down while the other part is coming up the street, instead of all coming up the street and comparatively none going down, has a close relationship to accidents and injuries and especially the safety of children. (A splendid statement upon this subject will be found on page 101 of the New York Final Report, given by Mr. Edmund Dwight of the Employers' Liability Company.)

Ordinance makes new streets feasible.

The ordinance will likewise make it not merely possible but feasible for one or more parallel thoroughfares to be constructed and maintained about two hundred and five hundred feet north of Euclid Avenue and parallel with Euclid.

Along this thoroughfare the industrial property owners will be able to have much greater freedom for their trucking and for the quick and *un*obstructed transportation of their supplies and needs.

This will also mean that much of the traffic will feasibly and probably be kept off of Euclid Avenue, which will likewise result in the lessening of accidents and the factories themselves will be able to much more quickly transport their own needs along these "hinter" streets and they will likewise undoubtedly find themselves subjected to a much lesser number of claims and damages for accidents and injuries and the public safety and comfort

will be better served. (See Statement of Edmund Dwight of the Liability and Assurance Corporation at the middle of page 12 and the Statement of Mills E. Case, Secretary Department of Police, as given on pages 98 and 99 of the New York Final Report.)

This provision for streets is conceded by complainant's witness (Witzel) at upper half of page 155; also by defense witnesses at upper portion of page 183 and lower part of 184 and lower part of 194. This was repeatedly and openly discussed during the year while the Commission of Euclid Village was framing this ordinance and studying the situation. Nowhere was this denied by complainant or by its witnesses.

Nevertheless the Trial Court wrote: (middle of page 53 of the Record) "In the restrictive scheme, however, no provision is made and none seems to be contemplated for the opening of necessary highways or the preservation of land for that purpose."

Less and Less Homes.

Before leaving this subject, we wish to advert to the question of that so-called "greater public welfare."

We refer to the question of the *American Home.*

The New York Commission in its report found, and there is additional abundant evidence to substantiate the fact, that modern tendencies are rapidly destroying and undermining the continuance of separate and individual homes and residences.

The best minds of America are exhorting Congress and the States to do all that is possible in order to stem and prevent this tendency. As each city grows, there are proportionately less families living in houses than in apartments and tenements and above stores. The bulwark

and the stamina of this country has always been credited and conceded to the home owning tendencies of the American People.

But that excellent situation is all too rapidly waning and being undone by many and varying influences.

It is generally conceded that the home owner who has the opportunity to have his little garden and to rear his family in a house and to raise his children with a greater freedom of fresh air and abundance of light, is one of the most important factors in the sustaining of the American People and American Principles. Please see page 141 of Supplement hereof.

It means not merely comfort but it means greater safety for the children; a more vigorous generation due to plentifulness of fresh air and sunlight accompany those who live in houses; it means cleaner streets; it means less accidents for the young ones because they have a yard in which to play instead of being compelled to resort to the streets or to other places; it means greater interest in public welfare and in civic affairs which usually attends the householder who, by reason of his home, pays taxes; it means a closer relationship to the schools, a more restful condition for the head of the family and a place where the yard affords recreation and the opportunity for flowers and plants which are the highest accompaniment of a growing generation, and all of this means better children and men and women and health as well. (Kindly note page 31; middle of page 109; lower half of page 13; the first full paragraph on page 201, page 195—Statement of Mr. George C. Whipple, Professor of Sanitary Engineering, Harvard University; all found in the Final New York Report; and Mr. Whitten's testimony at lower portion of page 110 and page 111, middle of page 113 and lower half of 121; Mr. Greenlund's testimony on page 184 and second

paragraph of 194; and lower portion of page 207 of the Record.)

If houses and homes and residences are not to find ready quarters in the suburban territories, then where will they find themselves sheltered?

If that hillside terrain on the south side of Euclid Avenue which is naturally intended for residential purposes, is blighted by the approach of industries and spur lines and business and factories up to the north side of Euclid Avenue, then it means just so much of a stealth of territory from residential and home purposes and it means just that much more contribution toward the crowding of people in the Village, toward the conditions which spell for more accidents to the children, toward the lesser number of home-owning families in the municipality and toward the lowering of health standards which must necessarily follow where the congestion is greater and where the houses and homes are fewer.

The principles underlying the exercise of police power are old, but it will be seen from the decisions of the courts, that they are constantly being applied to new situations. The greatest necessity for this application is in connection with our rapidly growing communities. It has been found that the usual regulations found in building codes are not comprehensive enough to control the growth of a city upon welfare and healthful lines; to restrict the manufacturing to sections best adapted to it and where it will produce the least injury to the health; to prevent the blighting of large areas by industrial plants and business of a character unwholesome to inhabitants; to prevent slums and congested living quarters which always develop in blighted territory; to provide for the stability of property values, not only to home owners but to business houses and industrial plants as well, all of which makes

for a greater public welfare; to limit fire risks; to prevent lack of air and light; to enforce reasonable regulations as to light and air in building construction; to limit height of buildings; all of which when properly applied come well within the police powers.

It is to be regretted that the principles of zoning were not early applied to the City of Cleveland. It would not have had the congestion that now exists in the eastern section of the city.

The city of Cleveland has had a Commission studying this subject for four years. It has had a special assignment of engineers serve this commission.

And just a few months ago—after this research and study of four years—the Cleveland Council voted twenty thousand dollars more, with which to conduct the actual drafting of its own Zoning Ordinance. This ordinance is proceeding along the same lines as all so-called "standard" Zoning ordinances.

But Cleveland is assuming this task too late—after most of the damage has been done, after its blighted territories, its congested districts, its resulting "slums" and its "mixed" territories have overcrowded its hospitals, have overtaxed its juvenile court, have greatly impoverished its tax returns, have made necessary greater police and fire departments, have increased its daily accidents and have driven out countless of its homes.

Just so, Lakewood, Shaker Heights, Cleveland Heights, South Euclid, East Cleveland and most of the municipalities in this (Cuyahoga) County have adopted identical zoning ordinances; for they have seen not only the advantages but the *necessity* and *need* thereof in the light of present day tendencies and complexities.

New York, as is shown by the report of its Commission, must, for time to come, maintain a much larger fire and police force than would be required if the height of buildings, the area of lot per building and the use of lots and land had been regulated—if the city had been districted under a zoning ordinance. (Statement of Commissioner of Conservation, Thomas Addams, at the middle of page 77 of New York Final Report and top of 184 of the Record.)

And yet the argument of complainant was to the effect that there should not be and could not legally be any "districting" until all or most of the village had been built upon. Indeed, the Trial Court—at the upper portion of page 316 of the 297 Federal Reporter—declared a *present* districting *before* the damage was done and before the community's welfare had been completely defeated, to be the "placing of the village in a strait-jacket." With this the defendants and countless others are unable to agree.

REGARDING the OPINION of the Trial Court.

First: The opinion of the Trial Court appears to be deeply trenched in the theory that if a damage be shown, that of itself establishes unconstitutionality.

Not intending to make light of any loss or burden which might possibly fall upon the complainant, we cannot submit to the proposition that damage alone—even if proven—establishes unconstitutionality, for it is recognized by the Federal as well as the State Courts that in the proper exercise of the Police Power, burdens and losses very often fall upon at least a part of the members of the community and sometimes such damage falls upon most of the community, and yet that loss or damage of itself, does not constitute or establish unconstitutionality. Striking examples of this may be seen in the numerous decisions both State and Federal. (For example: 199 U. S. 306, 54 O. S. 284, 123 U. S. 623, 200 U. S. 561, 237 U. S. 171, 239 U. S. 410, 97 O. S. 130, 229 N. Y. 320, 113 Kans. 153, 207 U. S. at 87, 214 U. S. at 91—all *infra.*)

In this connection it is to be remembered that the proof not only apparently failed to establish any damage but the greater weight if not all thereof, established an enhancement of value for the complainant's land.

Second: In the Opinion, the Trial Court cited cases which we do not believe support the text of the Opinion. For example the cause of *Eubank vs. Richmond* in 226 U. S. 137, (cited at the lower portion of Page 312 of the Opinion) did *not* hold that Zoning was unconstitutional, for it was distinctly confined to the holding that that particular ordinance delegated legislative power to the adjoining property owners and also that the issuance of the permit was dependent upon this illegally delegated power as well as upon the whim of the official in charge. This is plain

from the decision itself as well as from 242 U. S. at its concluding paragraph where Justice Clark *again* made it clear that this *Eubank* case did *not* stand for the doctrine for which it is cited by the Trial Court in the present case. Likewise, the case of *Spann vs. Dallas* does not establish the doctrine which the Trial Court ascribed to it, for that case was plainly decided upon the fact that the city did not have the delegated power; that the districts were indefinite and not defined and that it depended upon the consent of three-fourths of the property owners. It does not present a zoning ordinance. The *un*qualified citing of this case as being adverse to a comprehensive zoning ordinance is *not*, in our judgment, warranted.

So too, *Friend vs. Chicago,* cited at middle of page 315 of the Opinion was decided quite some years ago and before there were any zoning Acts or Ordinances in this country; it was not founded upon any partial or comprehensive zoning ordinance nor has it generally been looked upon as any authority in connection with this subject. The same must be said regarding *Dorr vs. St. Louis,* which is similarly cited in the Opinion. The distinction in both of these cases is so apparent that their being cited as unqualifiedly supporting the doctrine for which they are urged, is a rather broad claim, we believe.

Many cases which are founded upon facts much more akin to the present situation and many pronouncements of the courts which are much more closely related to the subject, might have been cited in this brief, but because they really do not support or determine the doctrine here in question and because the facts or the legislation did not identically compare with that now in issue, we have purposely refrained from citing those cases as authority upon the subject at bar—as for example the important case of *Salt Lake City vs. Western Foundry Co.,* 55 Utah 447, and

the New Jersey case of *Schait vs. Senior,* 117 Atl. Rep. 518, and *Cliffside Park Co. vs. Cliffside,* 96 N. J. L. 278.

By the same token, we believe that less closely related decisions and less similar facts in those cases ought to preclude the citation of a goodly number of those decisions to which reference is made in the Opinion as well as those which were cited by the Complainant at the Trial Court hearing.

We have purposefully refrained from citing the case of *Hadacheck vs. Los Angeles and Sebastian,* 239 U. S. 394, as authority for the upholding of the present ordinance, because, though we recognize that this California case is repeatedly cited as supporting zoning, we believe such a contention is unfounded, for the *Hadacheck* case found its principal basis upon the right to exclude a business which really was or might readily have become a *nuisance.* We offered several references to this case, but these references have been on the subject of only collateral questions —such as the right and need to make classifications and such as the doctrine that mere damage alone does not render a police regulation unconstitutional, but nowhere did we cite this case as supporting the doctrine of a zoning ordinance, though many pronouncements in that decision would strongly tend to indicate expressions favorable to the validity of zoning.

In this same way, meaning to make this brief temperate and not all-claiming, we have refrained from citing the cause of *Manhattan Oil Co. vs. Des Moines,* 193 Iowa 1096, as an authority supporting zoning and have referred to it only for what *it really stands,* though many of its splendid paragraphs might most properly be urged as supporting a Zoning Ordinance. Likewise, we have made no reference, nor in the Trial Court did our *own* brief

make reference to the so-called *"Rent Law"* cases nor to the so-called *"Bill Board"* cases (*Cusack vs. Chicago*), for we have always seen so clear a distinction between those facts and the pronouncements in those cases as to make them improper of unqualified citation in support of a zoning ordinance.

Third: The case of *The Pennsylvania Coal Co. vs. Mahon* has had an important place in the Opinion of the Trial Court. It would be quite improper for us to attempt to point out to the Supreme Court what was meant by this decision. However, we take the liberty of saying that we understand the facts in the *Mahon* case to be clearly different from the situation in the present instance and the destruction of the *contract rights* as well as the destruction and taking of the title to and the *estate* in the property—not merely regulating its use—as being at least two points which mark the *Pennsylvania* case as unwarranted in being cited in the instant cause.

No property right and no estate created by deed or other instrument is here abolished, destroyed or even regulated. The property rights asserted by Complainant are simply those which inhere generally in the owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Beyond this, zoning regulations do not fall within the *Pennsylvania Coal Company* case where specific property interests created by contract were destroyed by the statute.

The *Mahon* case was generously quoted by Counsel for the present complainant, where the same Counsel, as *amici curiae,* in the Supreme Court of Ohio in the cause of *Pritz vs. Messer,* filed an adverse brief. Notwithstanding this, the opinion of the Ohio Supreme Court—favor-

able to zoning—makes no reference to the *Mahon* case and this would seem to have indicated that our Ohio Court did not regard the *Mahon* case as being pertinent or controlling in reference to a zoning ordinance situation.

Fourth: The opinion of the Trial Court, at the middle of page 315, stresses the fact that the Federal Supreme Court has sustained many cases only because the final court of these respective states from which the appeals have been prosecuted, have decided in favor of the particular respective limitations involved in those cases and then the Trial Court pointed out the fact that there was no decision of the final court of Ohio in reference to zoning limitations. Since that opinion was written, the Court of last resort in Ohio—in the recent case of *Pritz vs. Messer, infra*—has apparently determined that the basic limitation, as to use, height, bulk and location and as to the right to establish zones therefor, are a valid exercise under the State as well as under the Federal constitution, so that the language of the Trial Court in reference to both of these points now appears to be opposed to its own ruling.

Fifth: The decisions hereinafter set forth compel us to dissent from the upper portion of page 317 where the Opinion ascribes the favorable Massachusetts and Louisiana decisions to State constitutional amendments, for each of these decisions are plainly and, in the language of their own courts, not so founded. (See pages 278 and 280 of 154 La. and page 611 of 234 Mass.) Nor can we subscribe to the assertions on page 317 to the effect that California and Minnesota are opposed to zoning, because we have the clear language of these courts, as appears hereinafter, to the contrary. Both of these states have held these ordinances legal and constitutional.

Sixth: In final, we are unable to agree, as set forth in the concluding paragraph of the Opinion, that this *entire*

ordinance is illegal and—for the many reasons, and owing to the hereinbefore cited proof as well as because of the hereinafter cited decisions—we respectfully dissent from any determination holding this ordinance illegal as to the complainant or its land.

Seventh: The Trial Court, at the bottom of page 316 of the Opinion, stated that "the great weight of State authority, as well as sound reason, is with the cases which hold an ordinance imposing restrictions such as here involved to be invalid, as an unreasonable taking of private property." Chief Justice Rugg and all of his associates in the highest court of Massachusetts; all of the members of New York's highest tribunal; the Chief Justice of Louisiana and his co-members; the Justices of California's highest court; the majority of Minnesota's Supreme Court; the members of the Supreme Court of Wisconsin; the entire Kansas Supreme bench; Justice White being among the minority of the Missouri Court; likewise Chief Justice Bond of the Maryland Court and now the Ohio Supreme Court—as found in the body of the *Pritz vs. Messer* decision—have *expressly* stated that in their respective judgments the weight of authority and the better reasoning are in *favor* of the validity of these ordinances.

ARGUMENT.

AS TO COURT DECISIONS.

In this succeeding part, we are desirous of inviting the attention of the Court to the decisions of the Federal Supreme Court and of the final courts of the States, in reference to the rules attendant upon the exercise of the Police Power and in reference to the specific decisions upon the question of Zoning itself.

POLICE POWER.

By reason of "Article X" of the Federal Constitution, the Federal Supreme Court has repeatedly declared that the Police Power was specifically and purposely reserved by and to the states themselves. This was the very purpose of this amendment to the Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are *reserved* to the states or the *people.*"

LATITUDE OF POLICE POWER.

The great width and the very great latitude of the Police Power may best be appreciated and set forth by the following decisions:

The police power is well stated by Justice Harlan in *C. B. & Q. Railway vs. Drainage Commissioners,* 200 U. S. 561, 592, decided March 5th, 1906:

> "The learned counsel for the railroad company seems to think that the adjudications relating to the police power of the state to protect the public health, the public morals and the public safety are not applicable in principle to cases when the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety * * * We cannot assent to the view expressed by Counsel. We hold that

the police power of a state embraces regulations designed to promote the *public convenience or the general prosperity,* as well as regulations designed to promote the public health, the public morals or the public safety."

Freund in his treatise on the Police Power well states that a study of the various cases in which the police power has been applied

"will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development."

94 U. S., page 113 at page 124, *Munn vs. Illinois.*

POLICE POWER KEEPS PACE WITH NEW CONDITIONS.

The Village of Euclid and all of the many states and the array of municipalities which have adopted these Zoning Ordinances have felt that the Police Power necessarily *must keep step with* and *must keep pace with* the *new* and daily problems presented by the complexities of modern civilization, transportation and conditions.

These ordinances are not thought to be any enlargement or stretching of the Police Power, but are merely necessary steps required and really demanded by the swiftly moving current of modern conditions.

Accurately speaking, the Police Power does not grow for it is always complete. New public needs, new situations and new conditions necessitate new methods and require legislative enactments.

American urban conditions present problems so different from the problems of the pioneer and early rural life, that new types of measures become necessary to solve and control and meet these new conditions.

But the Police Power is always equal to the requirements of the public welfare.

As was said in *Bacon vs. Walker,* 204 U. S., page 317:

> "It, the Police Power, extends to so dealing with the conditions which exist in the city as to bring out of them the greatest welfare of its people."

In 239 U. S. 394, *Hadachek vs. Los Angeles,* Justice McKenna, speaking for the court, said:

> "While the police power of the State can not be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of the government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it, when not arbitrarily exercised.
>
> "A vested interest can not, because of conditions once obtaining, be asserted against the proper exercise of the police power,—for to so hold would preclude development. (*Chicago & Alton Railroad vs. Traubarger,* 238 U. S. 67.)
>
> "There must be progress, and in its march, private interests must yield to the good of the community."

237 U. S. page 52 at 58, *Sligh vs. Kirkwood;*

113 U. S. page 27, *Barbier vs. Connolly;*

177 U. S. page 183, *Gundling vs. Chicago;*

219 U. S. page 104, at page 111, *Noble Bank vs. Haskell.*

PRESUMPTION OF VALIDITY.

In reference to legislation—whether state or municipal—the Courts have decreed that Police Power Legislation is particularly presumed to be valid and legal.

Sinking Fund cases, 99 U. S. at 718;

Powell vs. Penn, 127 U. S. at 684.

COURTS WILL NOT ASSUME FUNCTION OF LEGISLATIVE BRANCH.

The Courts have further said that the judgment of the Court as to the necessity or propriety of the legislation will not be substituted for the legislative branch itself, unless the legislation is so apparently and so palpably unreasonable and arbitrary, that it can have *no possible* relation and *no possible* justification under either health, safety or general welfare.

113 U. S. 27, *Barbier vs. Connolly.*

Here Justice Field declared:

"The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies.

"And it would be extraordinary usurpation of the authority of a municipality, if a Federal Tribunal should undertake to supervise such regulations."

TO BE UNCONSTITUTIONAL, MUST HAVE NO RELATION TO HEALTH AND WELFARE.

The decrees of the Court establish the fact that before the legislation of this nature can be held unconstitutional, it must be found that the legislation has *no* relationship to either health, or safety, or public convenience or public comfort or prosperity or general welfare.

Opinion of the Court by Justice Clarke in 242 U. S. at bottom of page 530 and top of page 531, *Cusack Co. vs. City of Chicago.*

55 Utah at page 452, *Salt Lake City vs. Foundry Co.*

135 N. W. Reporter at 378, *State vs. Whithouse.*

In 240 U. S. at page 513, at the first and second paragraphs of *Armour & Company vs. North Dakota*, the Court said:

"The Supreme Court considered the statute as but a development of other laws passed in the exercise of the Police Power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were 'inseparably allied and any argument advanced upon one applied equally to the other.' And the court said as the law was drafted by the Pure Food Commission, it might be reasonably assumed, 'after 12 years of observation and study' and, further, that 'the expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for the measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief was founded on the evidence in this case and upon facts of which this Court can take judicial cognizance.'

"The Court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the Police Power, and in view of very recent decisions, it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained, and by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. It only remains to apply to the present case, the principles so announced."

After reading Mr. Greenlund's testimony on page 183; the upper half of page 184; the lower half of page 185; the middle portion of page 186; and Mr. Laronge's testimony at the lower portion of page 200, Counsel's own

testimony on pages 207 and 208; Mr. Ambler's contribution in the middle paragraphs of page 143; Inspector Stein's version at the lower portion of page 105 and top of 106, at the middle portion of 104; Fire Chief Ballou's thoughts as set forth at the middle of page 123, and on pages 95, 96, 97 and 98; Witness Kunkle's admissions at lower half of page 93 and throughout pages 94 and 89; Mr. Witzel's similar admissions on page 161; and the logical reasoning as expressed by Mr. Robert Whitten on pages 110, 111, 112, 113, lower half of page 120 and all of page 121; Mr. Laronge's statement in the concluding paragraph of page 200 and top of 201 of the testimony in the Record, who would be justified in saying that they are convinced there COULD be no relationship between this Euclid Village Ordinance and the safety, health and general welfare of the community?

UNCONSTITUTIONALITY MUST BE PLAINLY AND PALPABLY CLEAR.

Before legislation of this nature may be held unconstitutional and unwarranted, it must be made to *plainly* and *palpably* appear that the legislation has no such *possible* relationship. *Jacobson vs. Massachusetts,* 197 U. S. 11.

In 242 U. S. at top of page 531, *Cusack Co. vs. City of Chicago,* Justice Clarke, speaking for the Court, said: "We therefore content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court

of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare. *Jacobson vs. Mass.*, 197 U. S. 11, 30. And this, for the reason stated, cannot be said of the ordinance which we have here read"—and then—who can safely and without fear of contradiction say that it is plain and palpable that there is *no* relation to the public health and safety and welfare in this Euclid Village Ordinance?

MUST BE PLAINLY AND MANIFESTLY UNREASONABLE.

Likewise, before such legislation can be decreed to be unconstitutional, it must be found to be clearly and plainly and manifestly unreasonable and arbitrary.

242 U. S. at 529, *Cusack vs. City of Chicago;*
239 U. S. at 171, *Porter vs. Wilson.*

ILLEGALITY MUST BE CLEARLY ESTABLISHED.

Akin to the doctrine that such legislation is presumed to be valid, and as corollary thereto, it has been laid down as a rule that unconstitutionality is not to be *presumed* but must be *clearly established* and proved."

Sinking Fund Cases, 99 U. S. 700 and 718;
Powell vs. Pennsylvania, 127 U. S. 678 at 684;
216 N. Y. 154, *People ex rel. vs. Warden etc.;*
214 N. Y. 395, *People vs. Charles Schweinter Press.*

In the Record, can such proof be found as to constitute a clear establishment of the unconstitutionality of the ordinance in question?

FINANCIAL LOSS IS NOT THE TEST.

In the proper exercise of the Police Power, the Courts have said that even though there be a tremendous financial loss, yet that can not stand in the way of the public welfare because the public welfare can not be impeded or thwarted by private loss which is incident to such exercise of the Police Power.

Hadachek vs. Los Angeles, 239 U. S. at 410;
United States vs. Noble, 237 U. S. at 78;
Reimman vs. City of Little Rock, 237 U. S. at 171;
Erie R. R. Co. vs. Williams, 233 U. S. at 700;
Mugler vs. Kansas, 123 U. S. 623;
Sheehan vs Scott, 145 Cal. 684;
Cochran vs. Preston, 108 Md. 220;
State ex rel. vs. Cunningham, 97 O. S. 130;
Biggs vs. Steinway, 229 N. Y. 320.

LOCAL CONDITIONS MUST BE CONSIDERED.

It has often been the pronouncement of the courts that in interpreting Police Regulations, they must be interpreted in the light of the conditions of climate and the circumstances and the particular needs and situation of the particular community and that, if in the light of these conditions, the legislation can not be said to have no relationship to health, safety and general welfare and the like, then the legislation must be sustained and held valid.

McLean vs. Denver, 203 U. S. 38;
Ohio Co. vs. Indiana, 177 U. S. 190;
Affeld vs. N. Y. Co., 198 U. S. 361;
Welch vs. Swasey, 214 U. S. 91;
Plesay vs. Ferguson, 163 U. S. 537;
Brown vs. Walling, 204 U. S. 320.

THE KIND OF "TAKING" UNDER POLICE POWER IS NOT PROHIBITED.

Though there is unquestionably a "taking" under the exercise of Police Power, yet that taking is not such as is inhibited by or as requires compensation under the Constitution. This view is recognized in the case of *Interstate etc. Ry Co. vs. Commonwealth,* 207 U. S., 79, at page 87, speaking through Justice Holmes:

> "If the Fourteenth Amendment is not to be a greater hamper upon the established practices of states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

239 U. S. at Page 410, *in re Hadachek;*
214 U. S. at 91, *Welch vs. Swasey;*
108 Md. at 220, *Cochrane vs. Preston;*
218 N. Y. at 540, *Publicity Co. vs. Sup. of Building;*
97 O. S. at 130, *Euclid Doan Co. vs. Cleveland.*

The Supreme Court, speaking through Justice Harlan in 113 U. S. page 127, *supra,* said:

> And it would be extraordinary usurpation of the authority of a municipality if a Federal Tribunal should undertake to supervise such regulations. The Fourteenth Amendment of the Constitution does not impair the Police Power of a Municipality."

CLASSIFICATION IS PERMITTED AND EVEN NECESSARY.

Under the exercise of the Police Power, classifications may and indeed must almost necessarily be resorted to and such classification does not invalidate the legislation if it treats all, within the same class, upon an equality.

280 Federal Reporter, at 394 in *Chicago & N. W. Railway vs. Railroad Commission;*

214 U. S. at top of pages 105 and 106, *Welch vs. Swasey;*

239 U. S. at page 395, syllabus 3, *Hadachek vs. Los Angeles;*

127 U. S. at page 687, *Powell vs. Pennsylvania.*

NOT INVALID IF THERE COULD HAVE BEEN A VALID BASIS.

The validity of Police Power legislation must be sustained if there COULD have been any basis upon which the legislative body might have thought or based its enactment.

280 Federal, at page 393 (1), *Chicago R. R. Co. vs. R. R. Commission.*

COURT WILL NOT SUBSTITUTE ITS JUDGMENT FOR LEGISLATIVE DIVISION.

The courts will not substitute their judgment or ideas in place of the legislative bodies, nor will the courts measure their judgment over, on such subjects, as against that of the legislative division.

Kindly see 240 U. S. at second paragraph of page 513, *Armour & Co. vs. North Dakota.*

197 U. S. 11, *Jacobson vs. Massachusetts;*

198 U. S. at page 6, *Benson vs. Henkel;*

242 U. S. at top of page 531, *Cusack Co. vs. City of Chicago;*

55 Utah at page 455, *Salt Lake City vs. Western Foundry etc. Works;*

67 Illinois at 113, *C. B. & Q. R. R. Co. vs. Haggarty;*

113 U. S. at 127, *Central R. R. vs. Petters.*

The GENERAL application and not one SINGLE instance must be the guide.

It has repeatedly been held that the validity of a Police Regulation is not to be adjudged or determined by the question of whether some one piece of property or some one use might not injure the health or safety or general welfare, but, rather, that the constitutionality is to be adjudged upon the general purpose and relationship of the ordinance and upon its *general classifications.*

164 N. Y. 510;

179 N. Y. 325;

249 U. S. 269; Syllabus 2 and upper portion of Page 271, and lower portion of Page 273 and at page 274;

248 U. S. at page 500.

In 26 L. R. A. (N. S.) 842, *Benz vs. Kremer,* the court said:

> "If the rule be in the interest of the public health it must be general and all within the class controlled by it.
>
> *Individual* cases can *not* determine the necessity of a general law on the subject, nor, indeed, rule the question of classification."

CONSTITUTIONALITY OF BOARD OF APPEALS.

The validity of the Board of Appeals has been sustained by the following decisions, some of which are in reference to these very Boards and some of which are in reference to other kinds of legislation where Boards have been provided and where their legality has been challenged on the basis of a delegation of legislative power:—

234 N. Y. 484, *People vs. Board of Appeals;*

214 U. S. at 103 to 108, *Welch vs. Swasey;*

136 N. E. 338 (Mass.), *Ayer vs. Cram,* (242 Mass. 30);

203 App. Div. 468 (N. Y.), *Broadway Company vs. Nulle, Superintendent;*

108 Miscellaneous 193 (N. Y.), *Sanders vs. Walsh, Supt.;*

236 U. S. 230, *Mutual Film Company vs. Ohio Industrial Commission.*

At the lower portion of page 60 of the Record, the Trial Court, in its Opinion, said:

> "In New York the validity of the statute of the State and ordinance of New York City is assumed rather than decided. Furthermore, the law and ordinance both provide: by means of a board, for suspending or varying restrictions application of any aggrieved owner."

In almost identical words, The Ohio Enabling Act (Section 4366—11) and the Euclid Ordinance (Section 23) do the same thing. The concluding portion of Section 23 of the Zoning Ordinance of Euclid Village provides that:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this Ordinance, The Board of Zoning Appeals shall have power, in a specific case, to interpret any such provision in harmony with the general purpose and intent of this Ordinance, so that

the public health, safety and general welfare may be secured and so that substantial justice may be done." (See page 24 of the Record.)

And yet the Trial Court pointed out that this difference between the New York Law and Ordinance and that of Ohio and Euclid Village, whereas there is no difference.

It is to be remembered that the Petitioner in the instant case did not apply to or go before the Zoning Board of Appeals nor did it apply for any permit whatsoever, nor submit any plans. (Kindly note top 6 lines of page 104 of the Record.)

However, in order to anticipate any contention on the part of the Complainant that the Zoning Board of Appeals is without legal standing on the ground that it is exercising legislative powers, we have deemed it advisable to refer to these phases of the subject and to these decisions in reference thereto.

In fact, some courts have held that a Zoning Ordinance, without a Board of Appeals is illegal because of the very absence of a Board of Appeals.

In the cause of the *Presbyterian Church of Omaha vs. Edgcomb*, 189 N. W. 617, it was found that the Zoning Enabling Act of Nebraska sets forth a general statement of the requisites of the standard Enabling Act with the *exception* of the Board of Adjustment and under the powers conferred by this act the City of Omaha passed a Zoning Ordinance which, among other things, established an area district called "E" in which buildings could occupy only 25% of the lot.

The church corporation had bought a building plot in such a district before the ordinance. Needing to occupy more than 25% of the lot, the church asked for a permit to cover 38%. As there was no Board of Adjustment to make a variance in this plainly exceptional situation the church sought a writ of mandamus to compel the Building Inspec-

tor to issue the permit. The Court of last resort held that it was unreasonable and confiscatory to prevent the construction of such a church because it somewhat exceeded the percentage allowable, inasmuch as it could not be shown that such a church in such a district would be harmful to the health or safety of the community. The ordinance was declared unconstitutional in *this* respect.

If the State Enabling Act had provided Omaha with a Board of Adjustment with power to vary in exceptional cases, this declaration of unconstitutionality would probably not have arisen.

Here is a rather plain case where the lack of safety valve function supplied by the Board of Adjustment brought about a declaration of unconstitutionality.

The case of the *Chicago Railroad Company vs. the Railroad and Warehouse Commission of Minnesota,* decided in May, 1922, held that "the law giving the commission power to allow deviations from the specifications, largely takes away the force of the argument that the law is illegal."

> "It is further claimed that this provision is subject to the arbitrary whim of the Railroad and Warehouse Commission.
>
> In cases of this kind, however, it will be assumed that the public commission will act fairly and with reason and not arbitrarily." 280 Fed. at 395, *Chicago R. R. Co. v. R. R. Commission.*

So too, in 242 U. S. page 590, *Merrick vs. Halsey & Co.*:—

> "The contentions based on the exemption and provision are a part of that which accused the law of conferring arbitrary discretion upon the Commission. The accusation is formidable in words, but it is the same that has been made many times. We repeat, there is a presumption against wanton action by the commission."

APPEAL BOARD IS LEGAL.

The entire case of the *State of New York ex rel. Sheldon vs. The Board of Appeals,* (234 New York 484—January 1923) proceeded upon the theory and the decision, in every line acknowledged that the Courts of New York and of some other states have continually and uniformly recognized the validity and the constitutionality of the Board of Appeals in these very Zoning Ordinances.

The decision is so manifest in this respect, that it does not recognize that question as any longer open to debate.

Board of Appeals Fills a Very Needed Purpose.

It is important to note what the highest court of New York State says in this recent decision, in reference to the desirability and the need of the power vested in the Board of Appeals. The Court stated:

> "The enumerated laws embodied the first comprehensive scheme relating to the division of the city of New York into districts and the class and character of the buildings to be permitted to be erected in such districts; in 1914 when the first statute was enacted the population of the city was upwards of five millions, the territory embraced within the boundaries of the city was three hundred and ninety-five square miles; the city was rapidly increasing in population and commercial activity and one would need be optimistic to conclude that the Board of Estimate and Apportionment in the labor assigned to it could avoid all unreasonable discrimination."

The court thereupon dismissed the action against the Board of Appeals and said, in the final paragraph of its twelve page decision:

> "Concluding, therefore, as we do, that the legislation authorized the Board of Estimate and Apportionment to confer upon the Board of Appeals the authority exercised by the Board in this case, the order of the lower courts must be reversed and the writ must be dismissed with costs upon and against the appellants in all courts."

AS TO COMPREHENSIVE ZONING DECISIONS.

The following decisions will indicate the list of causes in which *comprehensive* zoning ordinances have been held to be constitutional exercises of the Police Power. In each of these cases, damage was alleged and even admitted, whereas in the case at bar the proof disputes and negatives damage. In each of the following cases where the respective zoning ordinance was upheld the courts ruled that even if damage be admitted and proved, that would not deny the municipality the right to reasonably exercise its Police Power.

IN NEW YORK STATE.

The Lincoln Trust Company vs. Williams Building Corporation, found in 229 New York Reports 313; having been decided in 1918.

229 New York Reporter 320, *Biggs vs. Steinway and Sons,* decided in July 1920.

In this case, the piano people, Steinway & Sons, agreed to buy a parcel of property for $280,000.00 on W. 57th Street in New York City.

$28,000.00 was paid down on the contract which provided for the payment of the balance of $252,000.00.

Before the time arrived for the payment of the $252,000.00 balance, the New York "Zoning Ordinance" was adopted by the City of New York, which ordinance prohibited the erection of a *business* building on the property in question, because of its being in a *Residence* Use district.

Thereupon, Steinway and Sons refused to complete the transaction.

In this case, by virtue of the zoning ordinance, there was no mere slight "taking," but, on the contrary, the entire parcel was found to be useless for the purpose intended by the piano company.

At page 323, the final court of the State of New York said:

> "We have held that the zoning ordinance is a valid exercise of the police power."

It may not be amiss to point out that the Euclid Ordinance is almost an exact duplicate of the New York City Zoning Ordinance, except as to local names and locations.

The People of the State of New York ex rel. Sheldon, et al. vs. the Board of Appeals of the City of New York et al., decided January 16th, 1923 by the highest Court of New York State and reported in 234 N. Y. 484.

As parties to this suit, upon their own request, were the Waldorf-Astoria Hotel, the Farmers Loan & Trust Company of New York, the Joseph Choate estate and other equally well known parties.

The property in question was located on Madison Avenue, between 35th and 36th Streets and fronting, around the corner, on 35th and 36th Streets as well, involving the right of a *business or store use to encroach upon a residence use.*

The court stated that the question presented to the court was, "upon the sole ground that the Board of Appeals of the City of New York had exceeded its jurisdiction."

Mr. John G. Millburn was counsel for the parties complaining. Mr. Henry W. Taft represented The Farmer's Trust Company as Trustee of the William Waldorf Aster Estate, and the Coporation Counsel of New York (John P. O'Brien) represented the Board of Appeals. Mr. Edward M. Bassett as *Amicus curiae*, filed a brief in favor of the Board and supporting the Zoning Ordinance.

The court quoted the amended Section 20 of Article 5 of the New York Zoning ordinances, as follows:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict

letter of the provisions of this resolution, (the Zoning Ordinance) the Board of Appeals shall have power in a specific case to vary any such provisions in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done." (Like the Euclid Ordinance.)

In this instance the New York Board of Appeals granted certain relief when the aggrieved parties came before it on appeal from the ruling of the Superintendent of Building, which ruling of the Building Superintendent had refused to permit the construction of a certain building. There was an allegation made before the Board of Appeals that the enforcement of "the strict letter of the provisions of the ordinance would work an unnecessary hardship."

In the New York case, the complainants did appear before the Board of Appeals and the Board of Appeals did grant them relief. In the case at bar, the complainant has not applied for any permit and has refused to present its case before the Euclid Board of Appeals.

In the New York case, the relief having been granted by the Board of Appeals, certain of the surrounding property owners contended that the particular kind of relief which had been granted by the Board of Appeals, was beyond the power and beyond the authority of the Board of Appeals and the complaint was as to this action on the part of the Board of Appeals.

This entire case of *The State of New York ex rel. Sheldon vs. The Board of Appeals,* acknowledged the validity and the constitutionality of the Zoning Ordinance and of the Board of Appeals.

In the wake of these three outstanding New York decisions so rendered by the highest court of that state, there

have been a tide of rulings—each one recognizing and conceding the validity of the Zoning Ordinances not only of the city of New York itself but of other cities throughout the state of New York.

A mere noting of these decisions would require several pages and therefore we refrain from further citations from this state, in reference to court rulings upon Zoning Ordinances themselves, each of which decisions have been in favor of the constitutionality of the Zoning Ordinance of such cities as Rochester, among the larger and among the smaller municipalities as well.

See also 158 New York Supplement, at page 162, *in re Russell,* decided in 1916, and *People ex rel. The Publicity Co. vs. Ludwig as Superintendent,* 218 N. Y. 240, decided in 1916.

In 209 Appellate Division Reports 151 (N. Y.) decided in May 1924, the Court wrote:

> "It is not attempted, and, indeed, at this late day, it would be idle to attempt to impair, whittle down or set at naught 'zoning ordinances,' which in no wise transcend constitutional limitations or the power delegated by the Legislature. Such ordinances, when ordained in pursuance of a legislative grant of power to a municipality and operating without discrimination between property owners, are a lawful exercise of police power."

Since the original dictation of this brief, the highest court of New York, speaking through its Chief Justice, Hiscock, on November 24th, 1925, in the cause of *Wulfsohn vs. The Inspector of Building of Mt. Vernon N. Y.*—has written perhaps its most forceful decision in complete support of these zoning ordinances. Search of Law Reviews and the Northeastern Reporter does not as yet disclose a *printed* report of this decision.

MASSACHUSETTS DECISIONS REGARDING ZONING ORDINANCES.

MASSACHUSETTS has spoken on the CONSTITUTIONALITY of these property limitation cases.

In the briefs heretofore filed by Counsel for the Appellants, we were always compelled to content ourselves with such inferences and with such deductions as could very reasonably and properly be drawn from the Opinion of the Justices of the Supreme Court of Massachusetts, rendered in May 1920 and found in 234 Massachusetts 597. This Opinion was rendered in answer to the query of the legislature of Massachusetts and in this opinion the Supreme Court of that state gave very favorable replies, supporting the constitutionality of comprehensive Zoning Ordinances.

Thereupon the legislature of Massachusetts passed an Enabling Act and under this authority, many municipalities of Massachusetts, including Boston, adopted comprehensive Zoning Ordinances.

In the path of these comprehensive Zoning Ordinances, three cases arose and found their way to the Supreme Court of Massachusetts, so that there were presented not merely the moot questions ruled upon in the Opinion of the Justices, but there were actual parties before the court.

On October 18th, 1924, in the cause of the *Building Inspector of Lowell vs. Stoklosa*, 250 Mass. 52, and 145 Northeastern Reporter page 262—the Massachusetts Supreme Court held that Zoning Ordinance virtually identical with the Ordinance in Euclid Village—was constitutional and legal.

Again in the case of *Spector vs. the Town of Milton*, found in 250 Mass., 63 and 145 Northeastern Reporter page 265 and likewise decided in October 1924, the Supreme Court of Massachusetts ruled that the Zoning Ordi-

nance of Milton, Massachusetts, was in conformity with the constitution of the state of Massachusetts as well as in conformity with the *Federal* Constitution and it upheld the prohibition of a *business* building or *store* in a certain district which had been designated, by the Zoning Ordinance, as intended for residential purposes alone.

Then came the third case, *Brett vs. the Building Commissioner of Brookline,* found in 250 Mass., 73 and 145 Northeastern Reporter 269, wherein the court again unanimously ruled and this time it held that the Brookline Zoning Ordinance which forbade two family or multi-family houses from being constructed in a so-called "*single family*" district, to be a valid and constitutional regulation and *not* to be within the realm of its being said that it has no rational relation to public safety, health or welfare.

It may be attempted to be argued that because the constitution of the state of Massachusetts was amended so as to permit of Zoning that therefore these decisions of the Massachusetts court do not apply in other states.

However, in answer to such a possible contention, it ought to be said that the Federal Constitution has not been amended in respect to Zoning and yet—in the plainest of language—the Supreme Court of Massachusetts held that neither the constitutional amendment of Massachusetts itself nor the Enabling Act of Massachusetts were in violation of the *Federal* Constitution and from this it must be apparent that the Supreme Court of Massachusetts had not merely ruled that the Zoning Ordinance was constitutional because of the amendment to the Massachusetts Constitution but, the ruling is that the Ordinance, in the opinion of the Massachusetts Supreme Court, is not in contravention of the *Federal* Constitution.

If further evidence of this were needed it may be found from the fact that in the first case above—*Building*

Inspector of Lowell vs. Stoklosa—the Supreme Court of Massachusetts set forth that it would *not* feel itself bound to follow its advisory opinion rendered several years before in 234 Massachusetts 597 but that, after most careful reconsideration, the court now was (Page 263): "Without further present discussion, summarization, amplification, restatement or paraphrase, ready to adopt the advisory opinion as to the judgment of the Court in the case at bar."

"The advisory opinion covers every constitutional phase which has been argued or which has occurred to us," said the Court.

And that advisory opinion was rendered *before* there was any constitutional amendment in Massachusetts and furthermore the court specifically held that in its opinion, these Zoning Ordinances were not in conflict with the Federal Constitution—See Syllabus 3, page 262 of 145 N. E. Reporter, 250 Mass., page 52; and as the Federal Constitution has not been amended in respect to Zoning Ordinances, it may well be said that any effort to classify the recent Massachusetts decisions as being under the Massachusetts Constitutional amendment alone, is not a proper or fitting contention, but that, on the contrary, the Massachusetts decisions are out and out declarations in favor of the constitutionality of these comprehensive Zoning Ordinances when considered in the light of the *Federal* Constitution.

It is to be further noted that the reasoning of the Massachusetts court throughout the entire opinion—is a reasoning showing the affinity between Zoning Ordinances on one hand, and the health ad safety and general welfare on the other hand, and such a line of reasoning would not have been necessary or called for if the Court had been determining the entire question upon the Massachusetts constitutional amendment alone.

The Massachusetts decision was rendered *subsequent* to the ruling of the District Court in the case at bar, and so the Massachusetts Court had the Euclid Village decision before itself, and yet—as is evident from *Building Inspector of Lowell vs. Stoklosa,* at bottom of page 263 of 145 Northeastern Reporter (page 60 of 250 Mass.) the Supreme Court of Massachusetts declined to follow the ruling of the Federal District Court in the *Euclid* case.

And it did not rest this declination upon any mere basis of the Massachusetts constitutional amendment alone, but further upon the basis of a refusal to follow the reasoning itself as set forth in the opinion of the District Court in the Euclid Village decision.

The Court said at page 611 of 234 Mass.:

> "We are of opinion that the proposed statute cannot be pronounced on its face contrary to any of the provisions of the Federal Constitution or its Amendments. The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community."

Here the proscription of a *store* from a *residence* territory was, by the Massachusetts Supreme Court, held to *be* reasonable.

The Trial Court in the case at bar said (lower part of page 60 of the Record) in part: "The Opinion in 234 Mass. 597, was given to the legislature and is not an authority." This can no longer be said because that entire opinion has since been adopted in the above three cases and the Massachusetts Court has added even additionally emphatic expressions; and that too, despite admitted possible damage.

We invite the Court's attention to the following Massachusetts cases:

193 Massachusetts, 364, *Welch vs. Swasey,* decided in 1907.

This was a case which forbade buildings from being erected beyond a certain height, in certain parts of Boston and beyond a greater height in other parts of Boston. The court has held the entire ordinance constitutional as an exercise of police power and also held the delegation of the power to a Commission to be a constitutional delegation and not to be a delegation as to legislation.

This last ruling is important as to our Board of Appeals and is found in the 3rd paragraph on page 365. The court said that this was but a delegation of an administrative duty under direction of the law itself.

This case was unanimously affirmed in May 1909, in 214 U. S., page 91, in an opinion written by Justice Peckham at pages 103 to 108.

178 Massachusetts, 199, *Parker vs. Commonwealth,* decided in 1901.

174 Massachusetts, 476, *Attorney General vs. Williams,* decided in 1899, is an outstanding and important case and sustains the Boston Height Ordinance as a proper and constitutional exercise of Police Power.

136 N. E. Reporter, page 338 or 242 Mass., page 30, *Ayer vs. Cram et al.,* decided on June 30th, 1922, is a decision in favor of the Boston Zoning and Height Code.

This case clearly supports the Board of Appeals.

This case also supports the Zoning Ordinance.

NEW JERSEY DECISIONS.

New Jersey decisions are at least partially opposed to these ordinances.

When the first New Jersey adverse decisions were rendered, the State Enabling Act was—unlike that in Ohio—somewhat vague and indefinite and made up of a patchwork of Zoning and Enabling Acts, when its highest court decided that stores could not be excluded from residence districts by Zoning—*State ex rel. Ignaciumas vs. the Town of Nutley*, decided May 21st, 1924, and reported in 125 Atlantic Reporter, page 121.

The court in that instance purposely stated that it was *not* ruling that the Nutley Zoning Ordinance was in violation of the Federal or New Jersey Constitutions.

But apparently the adverse attitude of the New Jersey courts must be conceded as is evident from the list of cases, no one of which holds the Zoning Ordinance to be in contravention of the State or Federal Constitutions, but each of which holds that the respective prohibitions are not related to public health, safety and general welfare. These cases must be conceded as holding that Zoning Ordinances are not within the Police Power because they have no relationship to the public health, safety or welfare and, though they purposely have declared that they are not founded upon any contravention of the New Jersey or Federal Constitutions, we concede that they are against Zoning coming within the theory of the exercise of the Police Powers.

Among these adverse decisions which so held, the following may be listed:

Handy vs. the Village of South Orange (decided in February 1922, and found in 113 Atlantic Reporter, page 838), and *Ignaciumas vs. Risley* (decided on August 15th,

1923) and reported in 98 N. J. 712 (121 Atlantic Reporter 783).

Other than the original Nutley decision hereinabove first quoted, none of these rulings were by the highest court of the State of New Jersey, for all of the others were by the Supreme Court of that state.

In 127 Atlantic Reporter, page 785, *Max vs. the Building Inspector of Jersey City,* decided on February 26th, 1925, the Supreme Court of New Jersey held that a prohibition against the erection of a garage within a certain distance of a private dwelling was a proper exercise of the Police Power and was related to the health, safety and general welfare of the community, but that, we believe, was more founded upon its being a prohibition of what would come within a "nuisance" rather than being founded upon the greater and broader powers claimed under a comprehensive Zoning Ordinance and therefore we do not believe this decision to be opposed to the general line of adverse decisions to be found in the State of New Jersey.

Very recently the legislature of New Jersey, sensing the State wide demand for Zoning, recognizing the benefits therefrom and appreciating that one city after another throughout the state had adopted comprehensive Zoning Ordinances, passed a new Zoning Enabling Act and gave the proper power to the Boards of Adjustment (usually called the Board of Appeals in most cities) and there may now be a possibility of more favorable decisions.

As a result of one prior amendment which created and gave some power to the Board of Adjustment, the very same courts of New Jersey have somewhat modified their attitude by compelling litigants to *first* resort to and to *first* have recourse to the Board of Adjustment, *before*

coming into court. See *Falco vs. Kaltenbach*, 128 Atlantic Reporter, page 397, Syllabi 1, 2 and 3.

Now with the newly created State Enabling Act, it may be possible to expect even further favorable inclinations and rulings as to the entire subject of zoning.

Up to the present time, New Jersey has not squarely decided the Constitutional question.

One favorable lesson can be drawn from the New Jersey situation and that is the fact that even after adverse rulings of its State Court, many additional municipalities, realizing the benefits which New York and other neighboring cities in Connecticut and elsewhere have obtained from comprehensive Zoning Ordinances, have trustfully adopted comprehensive Zoning Ordinances, even within this very current year, so that, according to the Department of Commerce, New Jersey has the greatest number of zoned cities of any State, it having over 70 zoned municipalities.

Schaite vs. Senior, 117 Atl. R. 517 and *Cliffside Park Co. vs. Cliffside*, 96 N. J. L. 278, are not decisions favoring zoning, but we believe that they indicate a more favorable attitude and a more recent tendency toward supporting zoning.

MARYLAND DECISIONS.

In the case of *Goldman vs. Krowther*, Inspector of Buildings for the City of Baltimore, Maryland, reported in Volume 128 Atlantic Reporter, page 30, and decided in February, 1925, the highest court of the State of Maryland, by a divided opinion, held that the Zoning Ordinance of the City of Baltimore was not legal or valid. This decision held that a tailor shop could not be prohibited in a residence district in the City of Baltimore.

It may be of some moment and worth while to here point out that the State of Maryland does not have an Enabling Act but that, on the contrary, the City of Baltimore enacted its Zoning Ordinance under its so-called Home Rule Charter which merely authorized the *control of trades.*

Conceding everything that can be claimed for this decision, it nevertheless can not be fairly said that an *industrial* plant or factory prohibition in a residence territory would have no relationship to health, safety and general welfare, for it is common knowledge and the record in the Euclid Village cause is replete with proof that industries and factories *do* the very thing which the Supreme Court of Maryland held a tailor shop would not do, namely: "There is nothing in the record from which it can be inferred that such (tailor shop) use is offensive to the eye, the ear or the nose of a person of ordinary sensibilities, or that it imperils the public health, welfare or safety." (Page 61 of 128 Atl. Rep.)

Even the Maryland court admits that it is troubled and put in doubt by the conflicting results when it considers the Baltimore Ordinance from the standpoint of legality alone as contrasted with an approach by way of welfare and economic avenues (page 61). We can not refrain from wondering—aloud—whether this is not another instance similar to the New York situation in the case of *State of New York vs. Davis Williams,* decided in 189 New York 131, where the Supreme Court of New York was unable to find its way clear to support the so-called Labor Code, but where—after an elapse of a few years —the Supreme Court of New York frankly and plainly reversed itself and in the case of *People vs. Schweinler,* reported in Volume 214, page 395 of the New York Reports, emphatically validated this very same Labor Code.

After all, law is not abstract for it covers and it rules and it shapes the living conditions and the course of millions and this multitude is not an abstract number, but is, on the contrary, made up of real human beings who must endure real conditions and who, collectively, constitute our cities, our states and our very Union itself.

In Minnesota, Louisiana and one other state—as hereinafter cited—these very Zoning Ordinances were first held to be illegal just as has recently been held by the Supreme Court of Maryland and yet—within the course of a very few years—men have assumed their places upon the Supreme benches of these states and these men have in no uncertain terms declared that it is their earnest judgment and their honest opinion that comprehensive Zoning Ordinances are constitutional and are valid and so these states are today in the affirmative column.

May not Maryland experience the very same result?

It should be remembered that this Maryland decision is not founded upon any Enabling Act but is based on the very limited City Charter right to but "*Control trades.*"

The Court is respectfully asked to read the strong and able dissenting opinion of Chief Justice Bond in this Maryland case; Justice Urner concurring; where Justice Bond said:

> "May it not be that the stresses and strains of living in a large modern city, with all its complex activities, have grown to a point where the separation of business from dwelling places, offers a material, or even necessary aid in the maintenance of the health and vigor of the city population? May it not be that in the growth of our predominantly industrial civilization we have arrived at a point where special protection is needed for the mere business of living?"

MISSOURI DECISIONS.

In the case of the *City of St. Louis vs. Evraiff*, decided on October 6th, 1923, 301 Mo. 231 and 256 Southwestern Reporter 489, appears to lay down the rule that the Missouri Supreme Court has held the St. Louis Zoning Ordinance to be unconstitutional in so far as it forbids a non-nuisance business to be located in a residence territory.

The reasoning of the Court is clearly to the effect that such a proscription is unconstitutional, but it is a fact—as pointed out by the court at the top of Page 491—that this Ordinance was enacted not upon authorization of any State Enabling Act but was enacted without such an act and was based upon the St. Louis *charter alone*, and it is further a fact that this charter, as quoted by the Court itself, merely authorized the prohibition of specified *nuisances* and the "regulation or prohibition of any business which may be *dangerous* or *detrimental* to the public health."

Though we concede that the reasoning of the court is adverse to the constitutionality of the Zoning Ordinance, yet it is equally apparent that the charter provision was by no means as broad or as comprehensive in its authorization as are the State Zoning Enabling Acts such as obtain in New York, Massachusetts, Ohio and in a great majority of the States of the Union.

It is to be further noted that this decision was concurred in by four of the judges and dissented from by three other members of the court.

In the succeeding case of *State ex rel. Better Built Home and Mortgage Company vs. McKelvey*, found in 256 Southwestern page 495 and decided on the same day as the decision in the *St. Louis* case, *supra*, the court likewise held the St. Louis Zoning Ordinance to be invalid.

In that case however, only 3 of the judges concurred in the opinion, one judge concurred in the result alone and three of the judges dissented.

In the case of *State ex rel. Penrose Investment Company vs. McKelvey,* found in the same Volume 256 Southwestern at page 474 and 301 Missouri 1 and decided on the same day, the court similarly held the St. Louis Zoning Ordinance invalid and it again referred to the limited power of the City of St. Louis as prescribed in its *charter* (page 476) and in this decision three of the judges again concurred, one judge concurred in the result and three of the judges dissented.

May we ask the Court to read the dissenting opinion of Justice White, which appears on page 479 of Volume 256 of the *South Western Reports,* 301 Missouri at 26.

Mr. Newman F. Baker, in an article wrote, in part as follows:

> "The court held that the attempt to zone was contrary to the Missouri Constitution, which contained the words 'private property shall not be taken or damaged for public use without just compensation.' It should be noticed that the city's ordinance was passed under the charter powers and was not authorized by an enabling act."

The dissenting opinion by Justice White is a very able argument in favor of zoning. He says:

> "The great weight of authority, both Federal and State, is to the effect that a reasonable zoning ordinance is constitutional and the determination of what is reasonable varies with changing conditions, incident to modern development and civilization."

The effect of this decision was to produce chaos in St. Louis as well as other communities of the state. A flood of speculative building was released and "it has done incalculable damage to neighborhoods and districts."

AS TO TEXAS' POSITION.

The *Texas case of Spann vs. City of Dallas,* 111 Texas 350, 235 S. W. 513, is often cited as showing that zoning is unconstitutional, but it is misleading to call this a "zoning" case. Here we find a city ordinance prohibiting the construction of a business house within a residence district, except on permit granted with the consent of three-fourths of the property owners within a radius of three hundred feet and in accordance with a design approved by the building inspector. The ordinance defined a residence district to be "any part of the city where there are more dwelling houses than business houses within a radius of three hundred feet from the place where any business house, intended for the barter and sale of goods and merchandise of any description or for the conduct of any business, is sought to be constructed." The city urged that this was but a rightful exercise of its police power as conferred by a general charter provision granting it the authority to protect by ordinance "health, life and property," abate nuisances, preserve and enforce "the good government, order and security" of the city and to protect "the lives, health and property of its inhabitants."

We should remember that this was a "block" ordinance based upon the general grants in the city's charter, that the "zone" was not definitely bounded and that the consent of three-fourths of the adjoining property owners was necessary in order to erect a business house. The court correctly held this ordinance invalid, but this type of case should not be cited as bearing upon the constitutionality of the "modern," carefully drawn, and legally authorized zoning ordinance.

While the case was before the Supreme Court, the legislature made a specific grant of the right to zone.

Thirty days after the verdict, Dallas made amendment to her charter to give the commissioners the right to zone and a new ordinance was drawn expressly to cure the defects of the old. We should note that this ordinance did not contain the provision requiring the consent of three-fourths of the adjacent property owners. But in the case of *City of Dallas vs. Mitchell,* 245 S. W. 944, we find the court deciding upon the basis of the *Spann* case.

Having cited the Court to the favorable decisions of New York and Massachusetts and to the at least partial if not completely adverse attitude of the courts of New Jersey, Maryland, Missouri and Texas, we now wish to invite the Court's attention to those additional states which have ruled favorably in reference to comprehensive Zoning Ordinances, such as the ordinance in the case at bar.

CALIFORNIA FAVORS ZONING.

Beginning at the westerly coast, with the State of California, it is found that the opinion of the Trial Court in the case at bar (at upper portion of page 317 of 297 Federal Reporter) refers to the decision rendered by one of the subordinate courts of the State of California in December 1923.

The Trial Court in the case at bar pointed out that the counsel for the Village of Euclid has cited this California case, *Miller vs. the Board of Public Works,* as being favorable to zoning whereas the Opinion on page 60 of the Record, indicated that this case was decided by the subordinate court, adversely to zoning.

In 234 Pacific Reporter in the second column of page 382, the Supreme Court of Califronia wrote:

> "The Trial Court held said ordinance to be a valid exercise of the Police Power of the municipality

and *denied* the writ of mandate sought by the plaintiffs. From this judgment plaintiffs appeal."

This case is reported in 234 Pacific Reporter 381, decided February 27th, 1925; re-hearing being denied March 1925.

The constitution of California, as quoted at the top of page 383, give to this municipality almost the exactly worded powers which are contained in Article XVIII, Section 3 of the Ohio Constitution.

Supreme Court Justice Lennon in announcing the opinion in which all of the Associate Justices concurred, spoke in part as follows:

"What was at one time regarded as an improper exercise of police power may now, because of changed conditions, be recognized as a legitimate exercise of that power. * * * In its inception police power was closely concerned with the preservation of the public peace, safety, morals and health, without specific regard to the 'general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'

"So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principle upon which that right is founded."

In the succeeding case, *Zahn vs. the Board of Public Works of Los Angeles,* decided in March 1925, the Petitioner desired a permit to construct a business building in a district zoned for residential purposes under the Los Angeles Comprehensive Zoning Ordinance.

We invite the attention of the Court to Syllabi 3, 5, 7, 9, 10 and 11 at pages 388 and 389 of 234 Pacific Reporter; the court in the concluding Syllabus having said:

> "We are well satisfied that the weight of authority dealing with the subject of zoning may now be regarded as establishing that every intendment is to be made in favor of zoning ordinances, and the courts will not, except in clear cases, interfere with the exercise of power thus manifested."

In the case of *Blumenthal vs. Cryer,* decided in 1925 by the District Court of Appeals of California, the District Court followed the two above decisions of the Supreme Court of that State and held the comprehensive Zoning Ordinance constitutional.

Not claiming that either of these cases are upon the subject to zoning, we cite the Court to *Hadachek vs. Sebastian,* 239 U. S. 394, and *Ex Parte Quong Wo,* 161 Cal. 220, because in these cases the Federal and the California Supreme Courts have so well pronounced the doctrine to the effect that damage alone does not necessarily make an exercise of the Police Power unreasonable or unconstitutional and that the legislative department in the first instance at least, is vested with the power to determine the propriety of the application of this power and the necessity therefor. We do not cite these cases as authority upon zoning, but we refer the Court to them because of their clear declarations of some of the fundamental principles which underlie the subject of zoning.

KANSAS HOLDS ZONING TO BE CONSTITUTIONAL.

Tracing our path but a little further eastward we reach the State of Kansas where the courts have been called upon to rule in reference to the comprehensive Zoning Ordinances of several municipalities in that State, each one ably defended by Mr. George Siefkin.

In 113 Kansas 153 (214 Pacific 99), *Ware vs. the City of Wichita*, the court in upholding the comprehensive Zoning Ordinance enacted under the Kansas Enabling Act, said in part:

> "The next contention is that the Zoning Ordinance and the statute which authorize it have the effect of taking Defendant's property or of diminishing its value without compensation. It often happens that a valid exercise of the Police Power has such effect. The most common examples of this are found in statutes and ordinances relating to the health, safety or morals of the people."

Then came the case of *West vs. the City of Wichita* (decided in 1925), 234 Pacific 978, which re-affirmed the constitutionality of comprehensive Zoning Ordinances in the State of Kansas.

IOWA IS FAVORABLY INCLINED.

Though the comparatively recent case of *Des Moines vs. Manhattan Oil Company*, 193 Iowa 1096, is not exactly a zoning case, yet it is closely akin thereto in many respects and the reasoning of the Court is to a great extent pertinent to the subject of zoning. The study of this subject would not be thorough or complete without a reading of the text of the decision in this case.

LOUISIANA FAVORS COMPREHENSIVE ZONING.

It was the invariable practice of the opponents of Zoning to cite the case of *Calvo vs. the City of New Orleans,* 136 Louisiana 480 (67 South. Rep. 338, decided in 1925), as well as the case of the *State ex rel. Blaise vs. the City of New Orleans,* 142 Louisiana 73 (76 South. Rep. 244, decided in June, 1917) as indicative of the unconstitutionality of the comprehensive Zoning Ordinance of the City of New Orleans.

It seemed quite apparent to those who favored Zoning that both of these decisions were adverse merely and solely because the City of New Orleans had attempted to enact a Zoning Ordinance under its mere charter rights and not by virtue of any Enabling Act of the State. This was evident from the simple statement of the Supreme Court of Louisiana where it declared that "The Legislature did not intend to give the New Orleans Commission council any such right in the charter section quoted."

While these decisions were unjustifiably being cited as indicating an adverse position, in reference to Zoning, the Legislature of Louisiana did pass an Enabling Act and in the wake of this act, six separate cases reached the Supreme Court of Louisiana and were decided under one title, *State ex rel. Civello vs. the City of New Orleans,* decided on July 11th, 1923, and found in 154 Louisiana Reports 271 (97 South. 440).

The particular question in issue in the leading one of these six cases was the exclusion of stores from a residence neighborhood.

In this decision the Supreme Court of Louisiana, in referring to the *Calvo* and the *Blaise* cases, tersely declared that those two cases had merely determined that the charter provision of the City of New Orleans was not sufficient authority for the enactment of a so-called Zoning

or proscribing Ordinance. Then, coming to the important constitutional question which was now being presented to the court because an Enabling Act had since been enacted by the State Legislature of Louisiana, the Supreme Court of Louisiana said that:

> "In so far therefore, as the *Calvo* and the *Blaise* decisions maintain that a municipal Ordinance proscribing business establishments generally in a designated residence street or district as essentially only a matter of aestheticism, and can not be sustained upon considerations of public health, safety, comfort, or the general welfare, the two decisions are now overruled.
>
> "It is not necessary, for the validity of the Ordinances in question, that we should deem the Ordinances justified by the considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the Ordinances, we must assume that they did justify them."

From the date of those decisions there can no longer be any doubt of the fact that the highest court of the State of Louisiana has, in company with New York and Massachusetts already cited and in company with the many other states hereinafter cited, ruled that there is such possible relationship between the health, safety and general welfare of the community on the one hand, and these Zoning Ordinances on the other hand, as to be legal and valid under the Federal Constitution itself.

Indeed, at page 278 of the *Civello decision*, 154 La., the Louisiana Court stated that the legality of these Ordinances could not be doubted under the Louisiana Constitution itself and that the sole question was in reference to the legality under the *Federal* Constitution and upon this point the Court clearly ruled that in its judgment these

Ordinances are *not* in conflict with the Constitution of the United States. And this ruling was made notwithstanding admitted damage.

CONNECTICUT.

Here the court will find another recent decision.

It concerns itself with a "Set-back" provision.

In 95 Connecticut Reports 357, *Whitney vs. the Town of Windsor,* decided in August, 1920, the Supreme Court of Connecticut held this set-back provision of this platting ordinance, to be Legal and Constitutional, even though it admitted that this limitation did "take" or restrict the property.

Syllabi 2 and 3 depict the whole situation and enunciate the opinion and the decision of the court:

> "That while the Act did not take land, but merely regulated its use by requiring conformity to the plan of the commission in its development, such regulations nevertheless did in a measure deprive the owner of a part of his dominion over his land.
>
> That such restriction or deprivation, accomplished under reasonable regulations in the conservation of the public health, safety and welfare, was merely a legitimate exercise of the police power of the State as distinguished from the power of eminent domain.
>
> Eminent domain takes property because it is useful to the public; the police power regulates the use of property or impairs rights therein because the free exercise of these rights is detrimental to the public interest. The line between these two powers is a difficult one to hold, and it is not surprising that they have occasionally been confused.
>
> The 'due process' clause of the 14th Amendment of the Federal Constitution does not prevent the

State from making all needful regulations for the public welfare, nor does it require compensation to be made, in case these regulations are reasonable, although they do restrict the owner in the use of his property.

The State may regulate any business, or the use of any property, in the interest of the public health, safety or welfare and without making compensation, provided this is done reasonably.

The General Assembly in the exercise of the police power can establish building lines without making compensation where, as in this case, the regulations are reasonable under the circumstances present, and tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood."

This ordinance was founded on a quasi-compensation basis, but the reasoning is pertinent to the question at bar.

When in our citations we copy only certain parts, we do not do so to conceal anything in the uncopied portions and we ask the Court to read this and other partially quoted cases.

DISTRICT OF COLUMBIA FAVORS ZONING.

Having started at the Pacific and gone eastward, we now find ourselves in the City of Washington D. C., where Congress has enacted a comprehensive Zoning Ordinance substantially identical in wording with that of Euclid Village.

In the case of *Schwartz vs. Bronlow*—decided in 1921 by Associate Justice Van Orsdel and reported in 50 Appeal Cases, District of Columbia, the Congressional Zoning Act was inferentially held to be valid because the court ruled that since this enactment the authority of the Commis-

sioners of the District of Columbia had been superseded by the Congressional act which empowered a special "Zoning Commission" to enforce the Zoning Act.

In a decision written July 6th, 1925 in the case of *Steerman vs. Oehmann,* Inspector of Building and the Zoning Commission, by Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, the validity of the Zoning Act was sustained. In its opinion this Court wrote in part, as follows:

> "In my opinion, the zoning law is within the constitutional power of Congress, being included in the police power as defined by the Supreme Court in *C. B. & Q. Railway Company vs. Drainage Commissioners,* 200 U. S. 561.
>
> "The particular provisions of the zoning regulations attacked in this case, those prohibiting business houses in residential sections, are in my opinion designed to promote the public convenience as well as the public health and safety, and this I find to be the case, both as a matter of common knowledge and from the testimony introduced by the defendant.
>
> "It may be true that the zoning law or the zoning regulations may, as general laws usually do, work an injustice in particular instances, but they are not unconstitutional for that reason. It is true, too, that there might be some form of business which might be conducted in relator's property without injury to the public convenience or health or morals, but where the general policy of the law is within the powers of the Legislature it is also within its powers to determine the questions of fact upon which its legislation is based and to prescribe general rules designed to carry out its purpose and where there is nothing arbitrary or unreasonable in its determination of those facts the courts are bound by its acts."

The brief of Mr. Edward M. Bassett in this case is a worthy contribution to the subject of Zoning.

MINNESOTA FAVORS ZONING.

Retracing our steps and going toward the Northwest, it is found that the state of Minnesota is reported by the Trial Court in the case at bar (at the middle of page 317 of 297 Federal Reporter) as being in the column opposed to Zoning.

The situation as we understand it is as follows:

In the case of *State ex rel. Banner Grain Company vs. Houghton,* decided February 1919, the court refused a writ of mandamus against the Inspector and in its concluding paragraph said:

> "The area is practically level, sparsely settled and largely covered with brush and trees. The right of way of the main railroad company extends from the southeast to the northwest across the district, upon which there is a main and several side or storage tracks. The lots along the right-of-way are well adapted for industrial purposes, but we see no reason why the area in general might not be suitable for residential purposes and it has been so designated by the proper tribunal."

The next case arising in this state was under a quasi-condemnation plan: *State ex rel. Twin City Building Company vs. Houghton,* decided later in 1919 and reported on page 1 of 144 Minnesota Reports.

This decision rendered in 1919 held that this quasi-condemnation plan could not be employed to keep an apartment building out of a residence territory, because such a purpose was not for a public use.

However, during January 1920, this same case was re-argued with result that on page 20 and 21 the court wrote the following:

> "People are beginning to realize this more than before and are calling for city planning, by which the

individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments. The act in question responds to this call and should be deemed to provide for a taking for public use.

The former opinion rendered herein is *overruled.*"

On July 3rd, 1925 in the case of *State Ex Rel. Beery vs. Houghton, Inspector,* reported in 204 Northwestern Reporter 569, the Supreme Court of Minnesota plainly sustained zoning, for it spoke as follows:

"By the comprehensive zoning ordinance of Minneapolis a district is created in which the erection of four-family flat buildings is prohibited. The relator's property is in that district. The ordinance was enacted under the authority of Laws 1921, c. 217, as amended by Laws 1923, c. 364. Whether the ordinance is constitutional is the question.

The trend of the authorities is in the way of sustaining legislative regulations.

We hold that a fair zoning ordinance resulting in the exclusion of a *four-family flat* building from a designated *residential* district is constitutional. This holding is not in harmony with our earlier decisions. It is directly opposed to the result reached in *State vs. Minneapolis,* 136 Minn. 497. But as before stated, the last prevailing opinion in *State vs. Houghton,* 144 Minn. 1, 13, which established the law and nullified opposing individual opinions, was fundamentally opposed to some of the views made the basis of the denial of the right of exclusion under the police power in the earlier cases, though none of them were in terms overruled and perhaps should not have been. So far as in conflict with the view now adopted they are not to be followed."

WISCONSIN FAVORS ZONING.

Once more proceeding eastward we find that in the State of Wisconsin the Supreme Court, in the case of *State Ex Rel. Carter vs. Harper, Commissioner of Building of Milwaukee,* decided in 1923 and reported in 182 Wisconsin 148 and 196 N. W. 451, held Zoning to be legal.

Justice Owen at page 156 wrote:

> "The legislation authorizing so-called zoning ordinances is of comparatively recent origin, and it is not unnatural that those adversely affected should regard them as an unjust and unwarranted interference with their property rights.
>
> If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they, therefore, promote the general welfare. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power."

The next year, 1924, in the case of *Holzbauer vs. Ritter,* reported in 184 Wisconsin 35 and 198 N. W. 852. the court again upheld comprehensive zoning by holding that it was not creating an improper classification because the Ordinance provided for the exclusion of community *stores* from residential districts.

OHIO.

In our preceding delineation of State decisions, the terminus was in the City of Washington D. C. This eastward march finds its conclusion in the State of Ohio.

The case at bar comes from Ohio.

Recognizing that the Federal Court is not necessarily bound by the decision of the Supreme Court of a state when a Federal constitutional question is involved, yet it is true that the Federal Supreme Court has more than once

declared that especially in cases involving the exercise of Police Powers, a decision of the State court of last resort would be interfered with only in exceptional cases.

We urged before the Trial Court that the constitutional provision contained in Article XVIII, Section 3 of Ohio is self-executing and ought not really need any Enabling Act to effectuate it, and this thought has since been affirmed by the Supreme Court of Ohio in the case of *Perrysburg vs. Ridgway,* 108 Ohio State 245.

There may however have been usefulness in enacting an Enabling Act (Section 4366-1 to 4366-12 of the General Code of Ohio), for that act puts to rest all doubt as to the scope and breadth of authority which was delegated by the Legislature to all Ohio municipalities.

Thus, in Ohio there is a two-fold authorization.

THE FIRST COMPREHENSIVE ZONING CASE IN OHIO.

Because the case at bar comes from Ohio we take the liberty of tracing the Ohio decisions from the lower courts, upward.

In the case of *State of Ohio ex rel. Morris vs. Osborn, Inspector of Building of the City of East Cleveland,* decided in 1920 and reported in 20 N. P. (N. S. 549) the relator wished to mandamus the Building Inspector to issue a permit to erect an apartment house in a district from which apartment houses were excluded by the East Cleveland comprehensive Zoning Ordinance, which was identical with the Euclid Village ordinance.

Though this case was the decision of but an inferior tribunal, the cogent reasoning of Judge Kramer and its logical presentation has caused it to be quoted from coast to coast.

The court refused the writ and in part said:

"No one today, I take it, would question the right of a municipality, under its police power, lawfully to limit to certain districts slaughter houses, corrals, livery stables, laundries, carpet-beating establishments, etc. Not only would we consider that there was no question that this might lawfully be done but we would consider that there never could have been any question that it could be done. Yet, the books disclose that the validity of the laws so limiting these industries were attacked in the courts upon precisely the same grounds as are urged against the ordinance here in question. The law, as laid down in those cases, is precisely the same as it is held today. The law has not changed, but the application of the law has kept pace with changed conditions, conditions both material and of public thought. The conditions have so changed, since it was considered, that the right of the state to interfere with the use of private property, even to the extent of limiting its use as a slaughter house, was debatable, that it is now held that regulations limiting the height of buildings, the material used in their construction, and all of other minute limitations of building ordinances, fire district ordinances, etc., are too well established to be questioned."

The Euclid ordinance, but one other time assailed, was upheld by the local Common Pleas Court in *Cormica vs. Euclid Village.*

Another suburb of Cleveland, Lakewood, Ohio, enacted an identical ordinance and this time the Court of Appeals was applied to for a writ of mandamus to compel the issuance of a permit to construct an *apartment* upon a lot located in a residential zone limited so as "to be occupied by not more than two families." The Lakewood ordinance was upheld by the Court of Appeals and the writ was refused.

In the next case, *State ex rel. Danzig vs. Durant,* decided in 1923, another Court of Appeals refused the writ, saying:

> "Now while it may be true that in the past many courts have held such ordinances (zoning) as violative of the property and personal rights of individuals as guaranteed by the Constitution, it is likewise true that the modern tendency has been more and more to sustain such enactments * * * But such enactments cannot be made without some sacrifice of the individual rights of the inhabitants."

The case of *Kahn Brothers vs. Youngstown* engaged the attention of the Supreme Court of Ohio and was decided May 19th, 1925, being reported in 148 N. E. R. 842. The regulation in that case was held to be unreasonable and the decision was hailed as a barrier against the Ohio Supreme Court ever holding Zoning to be legal.

It required but a glance to see that in the Youngstown case the council had declared a very small section of the municipality to be a "Residence District" and it attempted to ostracize from that district all buildings other than single families, for the mere purpose of maintaining the superior tone of that one exclusive section and *not* for any purpose of promoting or protecting the public health or safety or welfare.

The Supreme Court of Ohio plainly indicated that this was a mere "Block" ordinance and that it was not even a partial zoning ordinance nor, of course, was it a comprehensive Zoning Ordinance such as in the case at bar. Indeed, in the hereinafter cited favorable decision of the Ohio Supreme Court, *Pritz vs. Messer,* there is not even a reference to this Youngstown case because the court did not regard the Youngstown case as presenting any comprehensive Zoning Ordinance, for the court in the Youngstown case, said:

"In other words, this is not a comprehensive Zoning Ordinance but is a so-called 'Block' ordinance, relating only to a certain small district in the city of Youngstown."

And the Court rightly held this attempt as *un*related to any *genuine* purpose of protecting the health or welfare of the community.

Another cause to reach the Supreme Court of Ohio was that of *State ex rel. Bolce vs. Hauser, Commissioner of Building,* decided December 9th, 1924, 111 Ohio State Reports 402.

The Supreme Court of Ohio stated that another cause was then pending before it (meaning the hereinafter cited case of *Pritz vs. Messer*) and that it had intended to defer its decision until it took up the constitutional question presented by this cause, but that the *Bolce* case presented the mere question of whether an exempting clause contained in an amending ordinance would permit the owner to construct the building in question.

The Court held that the amending ordinance—known as the "Duttenhofer Ordinance" did apply and therefore it ordered the permit to be issued but at the middle of page 407 the Court said:

"We do not pass upon the constitutionality of the original Zoning Ordinance adopted April 1st, 1924."

PRITZ VS. MESSER.

Then the Supreme Court gave its attention to the important question of the constitutionality of comprehensive zoning ordinances and on May 19th, 1925 it announced its decision upon the basic question of constitutionality, in the case of *Pritz vs. Messer* which presented the comprehensive Zoning Ordinance of Cincinnati, Ohio.

The Belvidere Apartment Company and Frank Messer contemplated the construction of an apartment building in violation of the provisions of the Cincinnati Zoning Ordinance, "relating to height, dimensions, area and bulk of the building within a Residence 'C' Zone. None of the use regulations of the ordinance would be violated by the building contemplated."

Emelia Pritz, an adjoining owner, prayed for a restraining order and predicated her right thereto upon the Cincinnati Zoning ordinance.

First our Supreme Court gave its attention to the question of the height regulation which, for years and in every state, has been recognized as a valid exercise of the police power, and in reference to this phrase, our Court said:

> "It has long been held that provisions which restrict the height of buildings have a relation to the public health and safety, 97 O. S. 130, *State vs. Cunningham.*"

Next it considered and promptly agreed to the recognized right to limit the bulk of the building or occupancy of lots.

Then, addressing itself to the more involved and the new question of the right to zone, the Court said:

> "The question here raised for the first time in Ohio is whether municipal authorities may definitely divide and zone a city, planning its development and regulating area, bulk, height and use of buildings differently in different districts."

The Supreme Court of Ohio, speaking through Justice Allen, stated that:

> "Since the answer of the defendant Messer attacks the constitutionality of the zoning ordinance the question is squarely raised whether, under the Con-

stitution of Ohio, and of the United States, a city can regulate building development and uses of property within its own boundaries according to zones or districts."

The counsel who are contending against the Euclid Village Ordinance presented a worthy brief as *Amici Curiae*, opposed to the validity of the Cincinnati ordinance. So that the Supreme Court had the opposing contentions of the present counsel in full, and in this brief were repeated references to *Pennsylvania Coal Company vs. Mahon*.

The Ohio Court had the further benefit of the ruling of the Trial Judge in the case at bar which had been rendered more than a year before and which was extensively quoted in the brief of the *Amici Curiae*. The Ohio Supreme Court—we believe it fair to say—did not share the view of the District Court in the case at bar.

The several briefs filed in this cause by Mr. Alfred Bettman are splendid expositions of the law relating to this subject.

This case is reported in the paper bound Advance Sheets of the 149 *North Eastern Reporter*, Volume 1, page 30, November 1925.

The Cincinnati Zoning Ordinance is comprehensive and is, in substance, identical with the one at bar.

The Answer of the Supreme Court to this question so "squarely raised as to whether a city can regulate building development and uses of property according to Zoning or Districts," is found in the Syllabus which reads as follows:

"1. Laws enacted in the proper exercise of the police power, which are reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full

use of property by the owner thereof do not constitute a taking of private property within the meaning of the constitutional requirements as to making compensation for the taking of property for public use or as to the deprivation of property without due process of law.

2. An ordinance enacted by a municipality under Article XVIII, Section 3 of the Ohio Constitution and under Sections 4366-1 to 4366-12, General Code dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses for trade, industry, residence or other specific uses, the height, bulk or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, setback building lines, and the area of yards, courts and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment."

We are very desirous of quoting page after page from this decision but we must content ourselves with a quotation of the Syllabus alone for the Syllabus in Ohio is the law of the case and because we know that—this being the pronouncement of our highest state tribunal—the Court will wish to resort to the full text and—so that we may not leave any misinterpretation of any part of this decision—we refrain from further quoting and respectfully refer the Court to the decision in full.

We do not claim that this ruling of the Ohio Supreme Court is a blanket endorsement for every zoning restriction, nor do we contend that improper restrictions may find shelter under this decision, but we believe that the

highest tribunal of the State of Ohio has validated the right of municipalities to reasonably establish districts for use, regulations for height and limitations of bulk, and that the highest court of Ohio having so pronounced, its decision may have that effect which is best set forth in the words of Justice Clarke, in 242 U. S. at page 530:

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour and Co. vs. North Dakota,* 240 U. S. 510, 514, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely with the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson vs. Massachusetts,* 197 U. S. 11, 30. And this, for the reasons stated, cannot be said of the ordinance which we have here."

In the earlier part of this brief we endeavored to indicate that the limitation in question was not confiscatory, that it was reasonable, that it was closely related to public health, safety and welfare and that it not only did not lessen but that it really enhanced the value of the Complainant's land and that its use for industrial or commercial purposes would be distinctly inimical to the public welfare.

And this proof, as stated in the Opinion of the Trial Court, is equally as available to the Supreme Court because the testimony was taken outside of the court room and was submitted in but a typewritten manner.

We are trustful that the Court may, upon the evidence as well as upon the law, sustain the ordinance in question.

The length of this presentation is indulged in by Counsel only because this is apparently the first time the subject of Comprehensive Zoning has been presented to the Supreme Court.

We do not believe that the ordinance in its *entirety* is unconstitutional, as was held by the Trial Court, nor do we believe that in its application to *complainant's* land there is other than a proper and lawful regard for the public safety, health and welfare.

CONCLUSION.

When the Country was in its early state, the powder mill, the inn, the houses and the primitive stores were clustered together in "Town Centers."

As the population grew and as conditions unfolded themselves, one of the first steps to be taken was the banishment of the powder mill from the "Center" of the town to a more outlying district where its potential dangers might be less to the Settlers who were clustered in a group. Perhaps the next step was the ostracism of those occupations which were usually termed as "Common Law" Nuisances.

But even these steps were not sufficient to properly protect the public welfare and there then began to appear, year by year, a great variety of enactments against what has come to be commonly called "Statutory" nui-

sances. These have denied the right to brick kilns, to livery stables, to public laundries and to a long array of occupations to be located within residential districts. In each of these progressive and successive steps, the courts have recognized these proceedings as being wise and public-serving and although each of these steps has been assailed in proceedings from the humblest to the final tribunal of this land, the public interests have warranted the courts in pronouncing such steps to be for the public good and within the proper exercise of the Police Power.

Another phase of the necessity of Public Regulation presented itself when many who always believed they could build upon their land with such buildings and in such manner as they chose because they were the owners of their land and were protected therein by the Federal and State Constitutions, found themselves confronted with enactments which minutely regulated the building and construction if it came within the definition of a "Tenement House." For a moment the courts of even the enlightened state of New York hesitated in stamping their approval upon these enactments, but only a few years were required to elapse before these very enactments received the validation of the same courts and in these validations the courts frankly reversed their former rulings. Today, throughout this land, the Tenement House Codes are recognized as not merely permissible but as being vitally necessary for the public welfare.

In the wake of investigation which was being carried on by Sanitarians, Engineers, and the Medical Profession, it became evident that unless buildings were denied the right to occupy more than a portion of their respective lots, light and sunshine and natural benefits would be thwarted and the health and safety of the community would, to that extent, be injured and reduced. To meet

this situation, Building Codes were authorized by every state and today there is no hamlet so small or so poor as not to have its thorough and exacting Building Code. These codes do not merely prescribe the kind of plumbing, the cubicle contents of sleeping rooms, the ventilation and window lighting of the rooms, but they distinctly regulate the limit and percentage of a lot which may be occupied by the building thereon.

Property owners resented the idea of being told just what plumbing they must install, what light and ventilation a sleeping room must have and the countless things which were required in construction, and they doubly resented the idea of being told how much of their land they could employ in their building, for they pointed to the State and Federal Constitutions as proof of their right to build and to use so much of their land as they themselves might choose to do. An assailment of a Building Code today would be rather an anomaly, for the Federal as well as the courts of last resort of every state have pronounced these codes to be legal and within the Police Power. At the time when these codes were being assailed, the very same arguments were offered as were proposed by counsel for the Complainant in the Trial Court in the case at bar, for then as now the property owners complained that their Constitutional Rights were being "nibbled away."

Though it was recognized that the ostracism of "Common Law" and "Statutory" nuisances were wholesome steps and though the Tenement House Code and Building Codes proved helpful to the public welfare, yet it was soon recognized that a new menace of the public safety was darkening the horizon by reason of the construction of very high buildings, which added their congestion to the streets which darkened the thoroughfares and which shut out the light from adjoining and nearby buildings. And so the

Police Power—always equal to the occasion of protecting the public welfare against new conditions as they arise—was once more invoked in the way of enactments which limited the *height* of buildings and which regulated them for the public safety. The Supreme Court of the United States as well as the final courts of state after state refused to be guided by the protests of the property owners who complained of the "nibbling away" of their constitutional rights and who loudly protested against these unwarranted intrusions, for these "height ordinances" are now recognized as legislation necessary to protect the public safety, health and welfare.

As congestion increased and as the complexities of city life multiplied, it became apparent that the danger of fire grew greater and greater and that each new building added its quota of danger because it presented one more unit which might take fire and spread its flames. And so the "*Fire Zone* Laws" were adopted by municipalities throughout the entire country. Many complained because the zone found their property just within and at the extreme edge of the "Fire Limit," whereas the property next thereto or just outside of the "Fire Limit"—on the opposite side of the street—was not subjected to the necessity of abiding by the Fire Zone Ordinance and so those within the limits were required to spend very substantial sums in order to comply with the Fire Zone Ordinance whereas those just outside of the zone were freed from this necessity and that gave a very substantial advantage to those just outside of the zone as compared with those just inside thereof, for the rentals and the income were alike, while the construction cost was much greater within than without the Fire Zone.

Who today would even think of assailing a Fire Zone Ordinance? And yet it is but a comparatively few years

since these very enactments were denounced and contended against by owners of property.

Each one of these and many similar enactments were occasioned by new and unfolding conditions and were necessitated by reason of greater complexity in Civic life, a greater realization of the need to protect the public health, the vitality of the nation, the safety of its people and the welfare of its children as well as the conservation of its property. None of these steps would have been necessary or appropriate in the early or colonial days but they did become necessary and they grew to be appropriate by reason of the increasing population, the manifest congestion, the intensiveness of American life and the new ills which sprang from these new conditions. The Police Power—always equal to new conditions as they arise—was necessarly invoked in order to protect the public welfare against these newly arisen conditions. In just this way it has for some years been found that though nuisances are ostracized, though Fire Zone Ordinances tend to lessen the dangers of conflagration, though building codes regulate the construction of building, though the same building codes regulate the portion of the lot which may be used, and though height ordinances regulate the height of structures, yet none of these alone nor all collectively are adequate to safeguard a real public welfare against the modern congestion, civic conditions, intensiveness of modern life, the tendency toward the annihilation of the American home, the congestion in streets, the terrible congestion in street cars, the resulting increasing communication of sickness, the blighting of territory, the destruction of property values, the increased fire hazards and the appalling increase of accidents with its resulting loss of life and limb.

Just as each one of these preceding steps were necessitated by the insufficiency of what had theretofore been enacted, so it is now recognized that unless the *Use* of districts can be designated, the benefits of preceding legislation will be defeated and will prove to be of comparatively little value in meeting the newest condition of American life. Unless the Police Power is elastic enough to meet these most recently created conditions, the people will need to be content to stand by and find themselves denied the right to take the *best* steps toward the prevention of communicable diseases, will be thwarted in their effort to sanely and in a broad-policy way relieve street congestion, to lessen fire hazards, to reduce street car over-crowding, to forestall blighted territories, to adequately protect public health and safety.

It may be urged that the present enactments and codes are sufficient to meet the present conditions, but that was the very argument which was offered in opposition to each of the exercises of the Police Power. Just as the isolation of the powder mill was not sufficient to meet the needs at the time when the Fire Zone Ordinances were enacted, so it is equally true that the building codes and the height regulations are not sufficient to meet the present-day situation. Today there is required a much *broader* line of procedure, a much *wider* course of action and a more far reaching plan if the welfare of the American people is to be safe-guarded, and this broad, wide and far reaching plan finds—not a panacea—but its best expression and its wisest utilization in regulating the Use for which territories and districts may be employed.

The colleges of the Country, the municipal authorities, the medical profession, the engineering bodies, the sanitary experts, the traffic authorities, the street car officials, the police departments, the Commerce Department of

the Federal government, the banks, the great money lending institutions, the taxation officials, the street cleaning departments, the fire insurance companies, the Civic organizations, the institutions for the protection of children, the Accident companies, and the fire departments have added their statements to the effect that the modern conditions require and necessitate this kind of exercise of the Police Power because the regulations heretofore enacted are unequal to the conditions of today. It is not surprising to find some who refuse to accept and who resist these far sighted and wisely planned exercises of the Police Power, for there has always been opposition to every exercise of the Police Power, and yet those who are now opposing this plan would not even think of resisting these enactments which but a few years ago were equally stoutly opposed and objected to.

The Zoning ordinances are but a composite of the Common Law and Statutory Nuisance Regulations, of the Tenement House and Building Codes, of the spirit of the Fire Zone provisions, of the Height Regulations, together with a districting reasonably applied in order to protect the public welfare, safety and health. None of these regulatory measures is claimed to cure all public ills, but each one does tend to lessen the public loss and injury, and so these Zoning Ordinances, being the most carefully wrought plan and the most comprehensive expression, are closely allied with and plainly tend to reasonably conserve and protect the public welfare, safety and health.

By August 1925, forty-one of the states had permitted their respective municipalities to adopt Zoning Ordinances, because each state has seen the benefits from and the very need and necessity of such a program in order to meet present conditions. Almost every city having a population of 200,000 or more, throughout the entire

Country, has availed itself of these Zoning Ordinances because the wisdom and the *need* thereof have been apparent. Even some of the small hamlets and indeed approximately 400 municipalities have enacted Zoning Ordinances which in most instances—for all intents and purposes—are identical with the one at bar. By August of 1925, over *twenty-six million* people were living within zoned territories within the United States.

The Trial Court has said: "It cannot be said that the Supreme Court of the United States has decided definitely or finally the exact questions here involved. The problem, therefore, is to determine in the light of the principles of law announced and the decisions made upon analogous facts, just what will be the ultimate decision of that Court when a case like this goes to it."

Many states, hundreds of municipalities and several millions of the people are eagerly looking forward with the hope and trust that this Court may find that there is such a relationship between these ordinances on the one hand and the public health, safety and welfare on the other hand, as to warrant this exercise of the Police Power in order to bring about a Greater Public Welfare.

Respectfully submitted,

James Metzenbaum,
Hickox Bldg., Cleveland, Ohio,
Attorney for the Village of Euclid and the Inspector of Building.

December 1925.

AUGUST 15th, 1925.

DEPARTMENT OF COMMERCE
WASHINGTON

26,000,000 People Live in Zoned Cities, Towns and Villages

There has been an increase of more than 130 per cent in the number of people living in zoned cities and towns in the United States during the past four years. By the first of July of this year more than 26,000,000 people were living in 366 zoned municipalities as against the less than 11,000,000 people in 48 cities and towns in September 1921. The number of zoned municipalities thus increased more than seven times during the four year period. The above statistics have been compiled by the Division of Building and Housing of the Department of Commerce.

Twenty-seven of the 33 largest cities in the United States, having populations of over 200,000 inhabitants, have now adopted zoning ordinances, the latest being Denver. The advantages afforded by zoning ordinances have resulted in the rapid spread of the zoning movement, shown by a comparison of the number of zoned municipalities at different dates. The 48 cities and towns zoned in September 1921 were increased to 159 municipalities on January 1, 1923, while on January 1, 1925, there were 320 municipalities zoned.

During the first six months of this year (1925) zoning legislation was enacted by Arizona, Idaho, Maine, New Hampshire and Utah which heretofore had been without zoning laws. Four of these five states used the Department of Commerce "Standard Act" wholly or in large part in drafting their laws. In addition a number of other states made use of the "Standard Act" in legislation supplementing and broadening the application of their existing zoning laws.

MARCH 12th, 1925

DEPARTMENT OF COMMERCE
WASHINGTON

Twenty-four Million Citizens Benefit by Zoning

Headed by the cities of New York, Chicago, Boston, Baltimore, Pittsburgh and Los Angeles, a total of 320 municipalities throughout the United States, with a total population of more than 24,000,000, had zoning ordinances in effect on January 1, 1925, according to information obtained by the Division of Building and Housing of the Department of Commerce. The municipalities range in population from the city of New York with its millions of inhabitants down to the smallest villages.

In adopting zoning ordinances, those cities, towns and villages have sought to protect home owners, and other land owners, in the reasonable use of their property, according to Dr. John M. Gries, Chief of the Division of Building and Housing. Zoning seeks so to regulate the use to which buildings may be put, the area of the lot which they may cover, and their height in different sections of the city, that the land in each district may be used for the purposes to which it is best suited. A neighborhood of small houses, for example, is secured against having a noisy factory site in its midst, with losses not only in peace and quiet, but in property values. The factory owner, on the other hand, is apt to have a better choice of desirable level plant sites with good transportation facilities, and provision is made in properly drawn ordinances for the orderly expansion of the central business district.

Sixty-two municipalities zoned during 1924. Of this number 28 have a population of less than 10,000 inhabi-

tants; 21 have more than 10,000 and less than 50,000 inhabitants; and 13 have more than 50,000 inhabitants.

Of the total number of zoned municipalities 199 have zoned comprehensively, regulating the use, height and area of buildings, while 121 do not go quite so far, many regulating only the use of buildings and some few regulating the use and area or the use and height of buildings.

Forty-four out of the sixty-eight largest cities in the United States, with a population of more than one hundred thousand, have zoning ordinances in effect. Of the combined population of all the cities having over 25,000 inhabitants, sixty-two per cent are receiving the benefits of zoning.

From Address by Herbert Hoover Before the National Association of Real Estate Boards, Chicago, Ill.

A disturbing fact is that the tentative figures from the forthcoming census indicate that the total number of homes owned by the occupiers has steadily decreased, and a total of nearly 60 per cent of our population are living as tenants, a larger ratio than many other countries. If we are to build up the stability and the happiness of our people, this is just the reverse of what should happen. Nothing is worse than an increased tenantry and landlordism in the country.

The municipalities through the enactment of wise zoning laws should co-operate.

This country of ours is still in the making. Shall we look forward as far-sighted empire builders to the conditions which will confront our children in another 20 or 30 years, or shall we as short-sighted, greedy opportunists exploit the present without regard to future consequences?